90-200

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MISSOURI PACIFIC RAILROAD COMPANY
d/b/a/ UNION PACIFIC RAILROAD COMPANY
Petitioners

v.

H.W. MITCHELL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

The question presented is:

> Does the Federal Employers' Liability Act require, as the U.S. Court of Appeals for the Sixth Circuit has held but the Supreme Court of Texas has refused to hold, that the jury consider whether a defendant had actual or constructive knowledge of a dangerous condition before the defendant can be found negligent?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Missouri-Kansas-Texas Railroad Company, and the Respondent, H. W. Mitchell. Petitioner's parent companies are:

1. Missouri Pacific Railroad Company[1]
2. Missouri Pacific Corporation (direct parent)

Petitioner's non-wholly owned subsidiaries and affiliates are:

1. The Alton & Southern Railway Co.
2. Arkansas & Memphis Railway Bridge & Terminal Co.
3. The Belt Railway Co. of Chicago.
4. Brownsville & Matamoros Bridge Co.
5. Chicago & Western Indiana Railroad.
6. Houston Belt & Terminal Railway Co.
7. Kansas City Terminal Railway.
8. Southern Illinois & Bridge Co.
9. Terminal Railroad Association of St. Louis.
10. Texas City Terminal Railway Co.
11. Terminal Industrial Land Co.
12. Trailer Train Co.
13. Wichita Union Terminal Ry.

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1. Missouri-Kansas-Texas Railroad Company merged into Missouri Pacific Railroad Company on 12-1-89; Oklahoma, Kansas & Texas Railroad merged into Missouri-Kansas-Texas Railroad Company on 11-30-89; San Antonio Belt & Terminal Company merged into Missouri-Kansas-Texas Railroad Company on 11-30-89; and Galveston, Houston & Henderson Railroad Co. merged into Missouri Pacific Railroad Company on 12-1-89.

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CASES

NO. _____

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MISSOURI PACIFIC RAILROAD COMPANY
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v.

H.W. MITCHELL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioner, Missouri-Kansas-Texas Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered on February 21, 1990.

OPINIONS BELOW

The final opinion of the Supreme Court of Texas sought to be reviewed is reported at 786 S.W.2d 659, and the opinion and judgment are reprinted in APPENDIX A.

The initial opinion dated July 5, 1989, withdrawn on rehearing by the Supreme Court of Texas, is reported at 32 Tex. Sup. Ct. J. 526, and is reprinted in APPENDIX B. A dissenting opinion was filed by Chief Justice Phillips on December 20, 1989, and also is reprinted in APPENDIX B.

The opinion of the Court of Appeals for the First Judicial District of Texas is reported at 743 S.W.2d 666, and is reprinted in APPENDIX C.

GROUNDS FOR JURISDICTION

The judgment of the Supreme Court of Texas was entered on February 21, 1990. (APPENDIX A). Petitioner's motion for rehearing was overruled on May 2, 1990. (APPENDIX D). This Honorable Court has jurisdiction to review the judgment of the Supreme Court of Texas under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

This case involves the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986) ("FELA"). The pertinent section of the statute is reprinted in APPENDIX E.

STATEMENT OF THE CASE

On January 21, 1984, Haskell W. Mitchell, a brakeman employed by Petitioner, allegedly was injured when, while boarding a locomotive, he slipped on ice that had formed on the steps and grab-irons. (S.F. 203)[2] He sued

2. Abbreviations of record references: S.F.—Statement of Facts, the transcription of the court reporter's notes; S.F. Supp.—Supplemental Statement of Facts, the transcription of objections to the charge. Tr.—Transcript, trial court documents such as pleadings and motions; Pl. Exh.—Plaintiffs' Exhibit; Def. Exh.—Defendant's Exhibit.

the railroad in Texas state court under the FELA.[3] The federal question presented by this petition was first raised with the trial court, where Petitioner sought and obtained an instruction to the jury regarding its determination of whose negligence, if any, caused the accident:

> In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant, Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.

(Tr. 17-18) (entire instruction reprinted at APPENDIX F). The jury found that Petitioner was not negligent under the FELA. (Tr. 17-18). The trial court entered a take-nothing judgment on the verdict on April 18, 1986. (Tr. 23-24).

On appeal to the First Court of Appeals of Texas, Respondent contended that "the trial court improperly instructed the jury that the plaintiff must prove foreseeability in a FELA case." (Brief of Appellant, First Point of Error at p. 2.) The First Court of Appeals, citing *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), affirmed the judgment of the trial court, holding that the instruction at issue was proper because it pertained merely to the Railroad's knowledge of a dangerous condition, rather than foreseeability of the injury, and that actual or constructive notice was required before negligence can attach. 743 S.W.2d at 667 (APPENDIX C at 43a).

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3. Respondent also brought a claim under the Boiler Inspection Act, 45 U.S.C. § 23 (1986). It is not at issue here.

On writ of error to the Supreme Court of Texas, the Respondent repeated his argument that the instruction improperly placed the concept of foreseeability before the jury, thus burdening his substantive federal rights under the FELA. (Appellant's Application for Writ of Error, First and Second Points of Error at p. 2) The Supreme Court of Texas, likewise citing *Baynum,* initially affirmed the trial court and the First Court of Appeals, holding that the instruction at issue did not inquire about the causal connection between negligent conduct and Mitchell's injury, but "merely focuses on the threshold issue of whether M-K-T knew or should have known of an unsafe condition in its work place." 32 Tex. Sup. Ct. J. at 527 (APPENDIX B at 21a).

On consideration of Respondent's Motion for Rehearing, however, the Texas Supreme Court withdrew its earlier decision. In a 5-4 decision, it reversed the Court of Appeals and held that the trial court submitted an "erroneous" instruction on negligence, "causing a greater burden to be placed on Mitchell than is permitted under the Federal Employers' Liability Act." 786 S.W.2d at 660-61 (APPENDIX A at 4a).

In its motion for rehearing of the second decision, Petitioner assigned as error that the Texas Supreme Court's decision deprived the Railroad of its substantive federal right under the FELA to be entitled to a finding that it knew (actually or constructively) of an unsafe condition before it could be found negligent. (Appellee's Motion for Rehearing at p. 2)

The record establishes that the Petitioner brought the federal question to the attention of the state courts ade-

quately and in due time; that the federal question was necessary to determine the case below; and that the necessary effect of the Texas Supreme Court's decision was to deprive the Petitioner of its substantive federal rights under the FELA, and its due process rights as guaranteed coextensively under the United States and Texas Constitutions, U.S. Const. amend. XIV and Tex. Const. art. I § 19, by depriving Petitioner of the opportunity for a fair trial. The record also establishes that there is no adequate and independent non-federal ground on which this judgment could be based.

REASONS FOR GRANTING THE WRIT

I.

The Texas Supreme Court's decision directly conflicts with the holding of the United States Court of Appeals for the Sixth Circuit in *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), and will result in a lack of uniformity throughout the United States with respect to proof of negligence under a FELA cause of action.

The Texas Supreme Court's decision directly conflicts with *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), in which the Sixth Circuit held that a substantially identical instruction was a proper statement of the law and that the railroad "was entitled to have it, or one to the same effect, given to the jury." 456 F.2d at 660. The conflict is plain when the two instructions are compared:

The Instruction Disapproved By The Texas Supreme Court.

In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant, Railroad, it must be shown that the Defendant-Railroad, through its officers, agents, and/or employees, *knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.*

The Instruction Approved By The Sixth Circuit In Baynum v. Chesapeake & Ohio Ry.

I charge you that the defendant cannot be deemed guilty of negligence for a defect in its premises unless it had *actual or constructive knowledge of that defect.* Therefore, unless plaintiff establishes, by a preponderance of the evidence, that the defendant had *actual or constructive knowledge of any claimed defect* in its premises, the plaintiff cannot recover, and your verdict must be in favor of the defendant, The Chesapeake and Ohio Railway Company.

Baynum was cited as authority in both the First Court of Appeals opinion (APPENDIX C at 43a) and in the initial Texas Supreme Court opinion (APPENDIX B at 22a). In its final opinion, however, the Texas Supreme Court completely ignored *Baynum*. Based on this conflict, juries in Texas state courts will be instructed differently from those in Michigan, Ohio, Kentucky and Tennessee.[4]

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4. Also compare a suggested instruction in 4 L. Sand et al,: *Modern Federal Jury Instructions* ¶ 89.02 (1990) at 89-26 (emphasis added), which states:

> This definition of negligence requires the defendant to guard against risks or dangers of which it *knew or by the exercise*

Accordingly, this case meets the criteria for granting a writ of certiorari in Sup. Ct. Rule 10(b).

II.

The Texas Supreme Court's decision conflicts with decisions of this Court, the United States Courts of Appeals and other state courts of last resort by abrogating the well settled principle that an employer's actual or constructive knowledge is a prerequisite to negligence under the FELA.

The decision of the Texas Supreme Court abrogates the Railroad's substantive rights under the FELA by removing a finding of actual or constructive notice as a prerequisite to negligence. Under this decision, a Texas jury may now find a railroad negligent even if the railroad had no knowledge of a transitory unsafe condition.

This Court has recognized that negligence under the FELA does not attach unless the employer knew, or in the exercise of reasonable care should have known, of the risks posed to its employees by unsafe conditions. *E.g., Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 117-18 (1963); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 7 (1963);[5] *Ringhiser v. Chesapeake & Ohio Ry.*, 354 U.S. 901 (1957); *Urie v. Thompson*, 337 U.S. 163, 178 (1949); *Wilkerson v. McCarthy*, 336 U.S. 53, 60 (1948).

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of due care should have known. In other words, the defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.

5. Notably, Westlaw reports that the Texas Supreme Court in this case has declined to follow his Court's decision on *Shenker*.

Comparison of the instruction at issue with the requirements of this Court makes the conflict obvious:

Instruction Disapproved By The Texas Supreme Court In This Case	*Urie v. Thompson*, 337 U.S. at 178
Before FELA negligence attaches, it must be shown that the *"Railroad knew, or in the exercise of ordinary care, should have known of an unsafe condition."*	Before FELA negligence attaches, it must be shown that the employer *"knew, or in the exercise of due care should have known"* of risks to employees caused by work place conditions.

Likewise, the United States Courts of Appeals have also followed the principle that knowledge is required in a FELA case. *E.g., Gallose v. Long Island R.R.*, 878 F.2d 80, 84-85 (2d Cir. 1989); *Nivens v. St. Louis Southwestern Ry.*, 425 F.2d 114, 118 (5th Cir.), *cert. denied*, 400 U.S. 879 (1970); *Miller v. Cincinnati, New Orleans & Texas Pac. Ry.*, 317 F.2d 693, 695 (6th Cir. 1963); *Kaminski v. Chicago River & Indiana R.R.*, 200 F.2d 1, 4 (7th Cir. 1952).

Other state courts also have consistently held that notice of a defective condition as an aspect of foreseeability is essential for a finding of negligence. *E.g., Kalanick v. Burlington Northern R.R.*, 788 P.2d 901 (Mont. 1990); *Dale v. Baltimore & Ohio R.R.*, 520 Pa. 96, 552 A.2d 1037 (1989); *Merando v. Atchison, Topeka & Santa Fe Ry.*, 232 Kan. 404, 656 P.2d 154 (1982); *Turner v. Clinchfield R.R.*, 489 S.W.2d 257 (Tenn. App. 1972), *cert. denied*, 411 U.S. 973 (1973).

Federal law governs the substantive issues in FELA cases brought in state courts. *St. Louis Southwestern Ry.*

v. Dickerson, 470 U.S. 409 (1985). The Texas Supreme Court claims to agree that actual or constructive knowledge is a prerequisite to negligence, but nevertheless concludes that a proper FELA instruction should "not place the issue of duty before the jury." 786 S.W.2d at 663 (APPENDIX A at 9a). Under principles of federal law, it is clear that a railroad's duty is dependent upon its knowledge of the alleged defect.

Negligence cannot be presumed "merely by proving an injury." *Nivens v. St. Louis Southwestern Ry.*, 425 F.2d at 118. The removal of the issue of knowledge from a finding of negligence in Texas will convert a FELA case into a strict liability action, rendering a Texas railroad sued in state court an absolute insurer for any work place injuries. Such a result is contrary to the intention of Congress. *See, e.g., Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138 (1959); *Conway v. Consolidated Rail Corp.*, 720 F.2d 221, 223 (1st Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *O'Hara v. Long Island Ry.*, 665 F.2d 8, 9 (2d Cir. 1981). Accordingly, this case meets the criteria for granting a writ of certiorari in Sup. Ct. Rule 10(c).

III.

By holding that the issue of knowledge does not involve a substantive right or defense under the FELA, the Texas Supreme Court has improperly used a Texas procedural rule as a subterfuge to deprive the Railroad of its federal substantive right to an instruction on knowledge as a prerequisite to a finding of its negligence.

The Texas Supreme Court held that the "form, necessity, and effect of jury issues are procedural rather than

substantive if they do not interfere with a right or defense provided by the FELA." 786 S.W.2d at 662. The court then erroneously concluded that "no substantive right or defense of the statute is affected" by its determination that the railroad is not entitled to the instruction on knowledge. *Id.* (APPENDIX A at 6a).

FELA cases filed in state courts may be tried according to the procedural law of the forum state, but must be governed by federal substantive law. *St. Louis Southwestern Ry. v. Dickerson,* 470 U.S. at 411. What constitutes negligence under the FELA is a federal question. *Urie v. Thompson,* 337 U.S. at 174. As has been shown, the employer's actual or constructive knowledge of an unsafe condition is an essential ingredient of a FELA case. When the evidence of the employer's knowledge of potentially hazardous climatic conditions is vigorously disputed, as in this case, the jury must be free to resolve the question under proper FELA law.

This Court has held that jury instructions concerning the measure of damages under the FELA constitute a substantive federal question, not a state procedure, and thus are subject to review by this Court. *See Monessen Southwestern Ry. v. Morgan,* 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. v. Dickerson,* 470 U.S. at 411. *See also Brown v. Western Ry. of Alabama,* 338 U.S. 294, 295 (1949) (a state cannot apply rule that pleadings are construed against drafter in a FELA case); *Dice v. Akron, Canton & Youngstown R.R.,* 342 U.S. 359 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state procedural rule). Likewise, in *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980), this Court held that the state trial court

erred in refusing to instruct the jury as to the non-taxability of the damage award. "Whether it was error to refuse that instruction . . . is a matter governed by federal law." 444 U.S. at 493.

The assertion of a federal right, when plainly and reasonably made, cannot be defeated under the name of local practice. *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. at 411. The Supremacy Clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942); U.S. Const. art. VI § 2.

The Texas Supreme Court's ruling in this case ignores the substantive federal requirement of actual or constructive notice as a prerequisite to negligence. The instruction at issue incorporated the correct definition of causation under the FELA, it correctly recited the federal substantive law on actual or constructive notice, it was brief, easily understood, and it was not prejudicial to either party. By finding it reversible error to so instruct the jury, the Texas Supreme Court has improperly used a state procedural rule to nullify federal rights. *See Arnold v. Panhandle & Santa Fe Ry.*, 353 U.S. 360, 361 (1957). This Court should not permit such a result to stand.

CONCLUSION

For these reasons, this petition for certiorari should be granted, and the judgment of the Supreme Court of Texas should be reversed. The Texas Supreme Court's opinion conflicts with the well settled principles established in

decisions of this Court and other courts, and will cause Texas jury charges under FELA to be inconsistent with those of every other jurisdiction.

Respectfully submitted,

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APPENDIX A

H.W. MITCHELL,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Respondent.

No. C-7286.

Supreme Court of Texas.

Feb. 21, 1990.

Employee brought Federal Employers' Liability Act action against railroad. The 268th District Court, Fort Bend County, A. Reagan Clark, J., entered judgment in favor of railroad. Employee appealed. The Houston Court of Appeals, James F. Warren, J., 743 S.W.2d 666, affirmed. Appeal was taken. The Supreme Court, Ray, J., held that jury instruction given effectively forced employee to prove foreseeability in order to establish causation and thereby caused greater burden to be placed on employee than is permitted under Act and giving of instruction was reversible error.

Reversed and remanded for new trial.

Hecht, J., filed a dissenting opinion in which Gonzalez, Cook, and Hightower, JJ., joined.

Cook, J., filed a dissenting opinion.

W. Douglas Matthews, Timothy F. Lee, Houston, for petitioner.

Gay C. Brinson, Jr., Brock Akers, Houston, for respondent.

ON MOTION FOR REHEARING

RAY, Justice.

Petitioner's motion for rehearing is granted. Our opinion and judgment of July 5, 1989, reported at 32 Tex. Sup. Ct. J. 526, are withdrawn, and the following opinion is substituted.

The issue presented involves the propriety of an explanatory jury instruction in a case brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986) ("FELA"), and the Federal Boiler Inspection Act, 45 U.S.C. § 23 (1986). Haskell W. Mitchell sued the Missouri-Kansas-Texas Railroad Company ("M-K-T") for damages based on injuries received during the course of his employment with the railroad company. After the jury failed to find negligence against M-K-T, the trial court rendered judgment that Mitchell take nothing. The court of appeals affirmed the judgment of the trial court. 743 S.W.2d 666. We reverse the judgment of the court of appeals and remand the cause for a new trial.

While attempting to board an M-K-T locomotive, Mitchell was injured after slipping from its steps. According to Mitchell, ice had formed on the steps and grab-irons of the engine and thus caused him to slip from the train. The jury found that ice was present on the train, but failed to find that M-K-T was negligent under the FELA in maintaining a reasonably safe workplace or in

providing reasonably safe equipment. With respect to the claim asserted under the Federal Boiler Inspection Act, the jury also failed to find that the steps and grab-irons were in an improper condition and unsafe to operate.

[1] Prior to the submission of the jury questions, Mitchell objected to a portion of the instructions pertaining to the issue of M-K-T's alleged negligence under the FELA. The question and the contested portion of the instruction read as follows:

SPECIAL ISSUE NO. 4

> Whose negligence, if any, was a cause, in whole or in part, however slight, of the occurrence of January 21, 1984 which has been made the basis of this suit?
>
> * * *
>
> In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant, Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.

Mitchell attacks this instruction for two basic reasons. First, he argues that the instruction violated his federal substantive rights under the FELA by placing the issue of foreseeability before the jury. Second, Mitchell characterizes the instruction as being an improper comment on the weight of the evidence. On the basis of these two theories, Mitchell claims that the instruction should not have been given and constitutes reversible error.

We hold only that the trial court erred in submitting an erroneous instruction to the negligence question, and

therefore do not address Mitchell's second argument. The challenged instruction effectively forced Mitchell to prove foreseeability in order to establish causation and thereby caused a greater burden to be placed on Mitchell than is permitted under the Federal Employers' Liability Act.

I.

[2, 3] This instruction effectively forced the plaintiff to prove foreseeability in order to establish causation, in clear violation of the substantive requirements of the FELA. It "appears perilously close to, if not identical with, the foreseeability component of probable cause, which is, essentially, nothing less than the ability to reasonably anticipate consequences." 743 S.W.2d at 668 (Levy, J., dissenting). A jury should not be instructed on foreseeability as a component of proximate cause in an FELA case. This is because under the FELA a plaintiff need not prove traditional common-law proximate cause, which is the combination of cause-in-fact and foreseeability. In an FELA case, a plaintiff is only required to prove that the railroad's negligence played any part, even the slightest, in producing the injury or death for which damages are sought. 45 U.S.C. §§ 51-60 (1986); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506, 77 S Ct. 443, 448, 1 LEd. 2d 493 (1957). Thus, common-law proximate cause plays no part in determining liability in an FELA case and requiring proof of it is reversible error. *Page v. St. Louis S.W. Ry. Co.*, 312 F.2d 84 (5th Cir. 1963); *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782 (Tex. 1978).

[4, 5] It is settled that a cause of action is established under the Federal Employers' Liability Act whenever the negligence of the employer played any part, however

small, in the injury which is the subject of the suit. *Rogers, supra.* Foreseeability is thus not a part of the causation standard as to negligence in FELA cases. It is less clear, however, whether foreseeability remains an element of the employer's duty of care. Mitchell cites authorities which appear to impose an absolute duty to provide a safe place to work, regardless of whether the railroad knew or should have known of the dangerous condition. *See, e.g., Shenker v. Baltimore & O.R.R. Co.,* 374 U.S. 1, 10, 83 S. Ct. 1667, 1673, 10 L.Ed.2d 709 (1963); *Duncan v. St. Louis-San Francisco Ry. Co.,* 480 F.2d 79, 83 (8th Cir. 1973). On the other hand, a number of authorities indicate that reasonable foreseeability of harm is an element in determining the employer's duty to provide a safe place to work. *See, e.g., Gallick v. Baltimore & Ohio Railroad Co.,* 372 U.S. 108, 117, 83 S. Ct. 659, 665, 9 L.Ed.2d 618 (1963); *Urie v. Thompson,* 337 U.S. 163, 178, 69 S. Ct. 1018, 1028-29, 93 L.Ed. 1282 (1949); *Richardson v. Missouri Pac. Ry. Co.,* 677 F.2d 663, 665 (8th Cir. 1982); *Almendarez v. Atchison, T. & S.F. Ry. Co.,* 426 F.2d 1095, 1099 (5th Cir. 1970); *Miller v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.,* 317 F.2d 693, 700 (6th Cir. 1963); *Kaminski v. Chicago River & Indiana Ry. Co.,* 200 F.2d 1, 4 (7th Cir. 1952). While time has vindicated Justice Frankfurter's pessimistic observation that "so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about 'fault' and 'proximate cause,'" *Wilkerson v. McCarthy,* 336 U.S. 53, 66, 69 S. Ct. 413, 419, 93 L.Ed. 497 (1949) (Frankfurter, J., concurring), we believe that under the weight of authority foreseeability remains an element of duty.

II.

The central question for our determination is whether, under the facts of this case, the court or the finder of fact should decide whether the risk was sufficiently foreseeable to impose a duty on the defendant.

M-K-T offers several federal decisions which suggest or imply that the issue of whether the employer knew or reasonably should have known of the risks posed by its workplace is a question of fact for the jury to decide in FELA cases.

[6] Mitchell argues that Texas law governs this question. Since the existence of a legal duty is a question of law in Texas, Mitchell argues that the submission of an instruction to the jury on foreseeability in an FELA case is improper. *See, Atchison, T. & S.F. Ry. v. Standard,* 696 S.W.2d 476, 479 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). State law dictates whether the court or finder of fact should determine duty and its factual elements. While federal law governs the substantive rights of the parties in FELA cases, procedural matters are governed by applicable state rules when tried in state court. *St. Louis Sw. Ry. Co. v. Dickerson,* 470 U.S. 409, 411, 105 S. Ct. 1347, 1348, 84 L.Ed.2d 303 (1985); *Scott v. Atchison, T. & S.F. Ry. Co.,* 572 S.W.2d 273, 276 (1978). This court has recognized that "rules relating to the form, *necessity,* and effect of jury issues are procedural rather than substantive if they do not interfere with a right or defense provided by the F.E.L.A." *Dutton v. Southern Pac. Transp.,* 576 S.W.2d 782, 784 (Tex. 1978) (emphasis added). As no substantive right or defense of the statute is affected by this determination, we look to the law of this state to resolve this issue.

[7, 8] In Texas, the existence of a duty is a question of law. *See, e.g., Oldaker v. Lock Constr. Co.*, 528 S.W. 2d 71, 77 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Rodriguez v. Carson*, 519 S.W.2d 214, 216 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Webb v. City of Lubbock*, 380 S.W.2d 135, 136 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.); *City of Bryan v. Jenkins*, 247 S.W.2d 925, 928 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *see also* 1 *Texas Torts and Remedies* § 1.03 [2] at 1-22 (J. Edgar & J. Sales eds. 1989); Kilgarlin & Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 So. Tex. L. Rev. 241, 245 (1986). The imposition of a legal duty "depends on such factors as contemporary attitudes on social, economic, and political questions," and their application to the particular facts at hand. 1 *Texas Torts and Remedies* § 1.03[2] at 1-22. In one recent case, for example, this court noted that "factors which should be considered in determining whether the law should impose a duty are the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer." *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). Among these factors, foreseeability has traditionally been considered the most significant. *See Genell, Inc. v. Flynn*, 163 Tex. 632, 637, 358 S.W.2d 543, 546-47 (1962).

While foreseeability as an element of duty may frequently be determined as a matter of law, in some instances it involves the resolution of disputed facts or inferences which are inappropriate for legal resolution. *See* 1 *Texas Torts and Remedies* § 1.03[2]. As the court of appeals explained in *Bennett v. Span Industries, Inc.*, 628

S.W.2d 470, 474 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.):

> The existence of duty is a question of law when all of the essential facts are undisputed, but when the evidence does not conclusively establish the pertinent facts or the reasonable inferences to be drawn therefrom, the question becomes one of fact for the jury. A particularly appropriate case for such a rule is one as here, where the risk reasonably to be perceived defines the duty to be obeyed; i.e., where knowledge and foreseeability are important elements of duty.

This is clearly a case when the existence of a duty depends upon "the factual setting and the interplay of factual and legal questions." Kilgarlin & Sterba-Boatwright, *supra*, 28 S. Tex. L. Rev. at 245 (1986). Whether or not the railroad knew or should have known that ice had formed on the steps and grab-irons of the engine is, when the evidence is in conflict, the type of issue which is properly and best resolved by the finder of fact.

We hold that the question of the employer's knowledge may be one for the jury; however, in this case, the instruction confused the issue of foreseeability relating to duty with the concept of causation. This confusion effectively forced Mitchell to prove foreseeability in order to establish causation, in clear violation of the substantive requirements of the FELA. This improper jury instruction was harmful and constitutes reversible error.

[9] A proper, succinct and well-drafted instruction for such cases in Texas may be had by the use of the *Pattern Jury Instructions* for FELA cases adopted by the Judicial Council of the Fifth Circuit. This FELA instruction to the jury reads, in part, as follows:

In order to prevail on this claim the Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That at the time of the Plaintiff's injury, Plaintiff was an employee of the Defendant performing duties in the course of his employment.

2. That the Defendant was at such time a common carrier by railroad, engaged in interstate commerce.

3. That the Defendant was 'negligent' as claimed by the Plaintiff; and

4. That such negligence was a 'legal cause' of damage sustained by the Plaintiff.

'Negligence' is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in *doing* something that a reasonably careful person would *not* do under like circumstances, or in *failing* to do something that a reasonably careful person *would* do under like circumstances.

For purposes of this action, negligence is a 'legal cause' of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage.

Id. This instruction is proper for Texas FELA cases, in that it (1) satisfies the FELA by having the jury make a determination of FELA "legal cause" rather than common-law "proximate cause," and (2) does not place the issue of duty before the jury.

Use of the preceding *Pattern Jury Instructions* will allow the jury to decide disputed facts relating to the employer's knowledge, will allow the court to decide the

legal question of duty, and will prevent the jury from regarding a finding of foreseeability as a prerequisite to its answering the causation issue affirmatively.

In this case, the instruction effectively required Mitchell to prove causation. This instruction violated his federal substantive rights under the FELA and constitutes reversible error.

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded for a new trial.

HECHT, J., files a dissenting opinion in which GONZALEZ, COOK and HIGHTOWER, JJ, join.

COOK, J., files a dissenting opinion.

ON REHEARING

HECHT, Justice, dissenting.

I dissent. In essence, the Court holds that juries in FELA cases must not be told what the law is lest they become confused and find for the wrong party. I do believe the Court has achieved a new level in result-oriented decision making.

The Court accurately states the law under FELA. A railroad is liable for damages suffered by its employees in the course of employment caused by its negligence in allowing a dangerous condition to exist in the workplace. Its responsibility is not limited to damages it should have foreseen would result, but extends to all damages in any way caused by its negligence. However, a railroad is not an absolute insurer of the safety of the workplace. It is not negligent in allowing a dangerous condition to exist if it neither knew nor should have known of that condition.

Whether a railroad knew or should have known of the existence of a dangerous condition in a given case is an issue to be determined by the finder of facts in that case.

Applying the law to this case, the Court acknowledges that there is an issue here whether the M-K-T knew or should have known that ice would form on the steps and grab-irons of the engine where Mitchell slipped, and that this issue was for the jury to decide. The Court does not say, and apparently does not think, that the trial court misstated the law when it instructed the jury "that, before negligence, if any, can be established against the Defendant, Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any." Indeed, this instruction states the law exactly as the Court does. Nevertheless, even though the jury in this case should have decided whether the M-K-T knew or should have known of the ice, even though the trial court properly instructed the jury accordingly, the Court holds that it was reversible error to give the instruction.

Why is it reversible error to give the jury an accurate statement of the law on an issue it must decide? Here is the Court's answer in its entirety:

> in this case, the instruction confused the issue of foreseeability relating to duty with the concept of causation. This confusion effectively forced Mitchell to prove foreseeability in order to establish causation, in clear violation of the substantive requirements of the FELA.

How the instruction confuses duty and causation the Court does not explain. The jury was specifically asked whether

any negligence of the M-K-T "was a cause, in whole or in part, however slight, of the occurrence". To find against M-K-T, the jury had to find that it knew or should have known of the unsafe condition caused by the ice, that it was negligent in allowing the condition to exist, and that its negligence was a cause, "however slight", of Mitchell's injuries. Given that these are the required findings for liability, and the Court agrees that they are, I cannot imagine how the jury could have been instructed on them any more clearly.

What suggestion does the Court offer for instructing the jury correctly on the elements of the law it has reiterated in its opinion? A "proper, succinct and well-drafted instruction for such cases", the Court says, is one which does not mention in any way that a railroad is not liable for conditions it does not and cannot know about, like the one the Court sets out in its opinion. Surely this is a most remarkable result. The jury must decide what the railroad knew or should have known, the Court states, but the jury must not be told that they must decide the issue or they will be confused. To be absolutely sure that the jury will not become confused, just do not breathe a word to them about what the law is. It is acceptable to say in Supreme Court opinions that a railroad is not an insurer of the workplace, but don't tell the jury. If they heard such an instruction, they might actually believe it and find for the railroad. One cannot be too sure.

If a correct instruction could confuse the jury, why wouldn't admissible evidence and proper argument pose the same threat? There is evidence in this case that the railroad did not know and could not have known of the dangerous condition that injured Mitchell. Should that

evidence have been excluded? Counsel argued this evidence to the jury. Was that argument improper? Why should the jury be permitted to hear evidence and argument on an issue it is not to decide? The Court does not answer these questions, I think, because it cannot.

There are two honest ways of resolving the dilemma the Court has made for itself. One is to hold that the instruction in this case was proper. Perhaps it should not be given in cases in which it is clearly established that the railroad knew or should have known of the dangerous condition, but in cases like this one, it is necessary. The other alternative is to hold that a railroad has an absolute duty to provide a safe place to work, regardless of whether it knew or should have known of the dangerous condition. Then the instruction is always improper and should not be given. Why does the Court not elect one of these two alternatives? Perhaps it has, only without saying so.

I would hold that the instruction in this case was correct and did not improperly comment on the evidence. I would affirm the judgment of the court of appeals. Accordingly, I dissent.

GONZALEZ, COOK and HIGHTOWER, JJ., join in this dissenting opinion.

COOK, Justice, dissenting.

I join the dissent but write separately. Rule 277 of the Texas Rules of Civil Procedure charges Texas trial courts with responsibility for submission of jury instructions. Tex. R. Civ. P. 277. Texas appellate courts have noted for some time that the rule allows a trial court considerable discretion in submitting those instructions. *See Scott v. Houston Indep. School Dist.* 641 S.W.2d 255, 257

(Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). The rule respects the unique ability of the trial court to ascertain the facts and issues arising from the evidence presented by the parties in the particular case before the court. In close cases such as this one, we should retain respect for the discretion of Texas trial courts and allow them to fashion instructions that are suited to the cases before them.

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 27, 1990

Mr. W. Douglas Matthews
Mr. Timothy F. Lee
Schmidt & Matthews, P.C.
2140 Allied Bank Plaza
1000 Louisiana
Houston TX 77002

Mr. Gay C. Brinson, Jr.
Mr. Brock Akers
Ms. Catherine Bukowski
Vinson & Elkins
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1001 Fannin Street
Houston TX 77002

RE: Case No. C-7286

STYLE: H. W. MITCHELL
v. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Dear Counsel:

Enclosed is the judgment of the Supreme Court as said judgment appears in the minutes of this court. This is the judgment that will issue in mandate form to the lower court if no motion for rehearing is filed or if a filed motion for rehearing is overruled.

Respectfully yours,

John T. Adams, Clerk

By: PEGGY LITTLEFIELD
Peggy Littlefield
Chief Deputy Clerk

THE SUPREME COURT OF TEXAS

NO. C-7286

From Fort Bend County, First District
H. W. MITCHELL,
Petitioner

vs.

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY,
Respondent

JUDGMENT

Petitioner's motion for rehearing, together with amendment to motion for rehearing, filed herein on July 20, 1989, having been duly considered, it is ordered that said motion for rehearing, as amended, be, and hereby is granted.

The majority opinion (and dissenting opinion) and judgment of this Court delivered on July 5, 1989, and dissenting opinion delivered on December 20, 1989, are withdrawn and the opinions and judgment of this date are substituted therefor:

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the First District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that;

1) The judgment of the court of appeals is reversed;

2) The cause is remanded to the District Court of Fort Bend County for a new trial in conformity with the opinion of this Court;

3) H. W. Mitchell shall recover from Missouri-Kansas-Texas Railroad Company, which shall pay, the costs of this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the district court for observance.

(Opinion of the Court delivered by Justice Ray)
(Dissenting Opinion by Justice Hecht joined by Justice Gonzalez, Justice Cook and Justice Hightower)
(Separate Dissenting Opinion by Justice Cook)
February 21, 1990

APPENDIX B

H. W. MITCHELL

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

No. C-7286

From Fort Bend County, First District.

Writ of error granted June 22, 1988. (31 Tex. Sup. Ct. Jour. 525.) (Opinion of the Court of Appeals, 743 S.W.2d 666.)

Judgment of the Court of Appeals is affirmed. (Opinion by Justice Cook. Dissenting opinion by Justice Ray, joined by Justices Mauzy and Doggett.)

For Petitioner: Schmidt and Matthews, W. Douglas Matthews and Timothy F. Lee, Houston, Texas.

For Respondent: Vinson and Elkins, Gay C. Brinson, Jr. and Brock C. Akers, Houston, Texas.

The issue presented in this case involves the propriety of an explanatory jury instruction in a case brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) ("FELA"), and the Federal Boiler Inspection Act, 45 U.S.C. § 23 (1982). Haskell W. Mitchell sued the Missouri-Kansas-Texas Railroad Company ("M-K-T") for damages based on injuries received during the course of his employment with the railroad company. After the jury failed to find negligence against M-K-T, the trial court rendered judgment that Mitchell take nothing against M-K-T. The court of appeals affirmed the judgment of

the trial court. 743 S.W.2d 666. For the reasons stated below, we affirm the judgment of the court of appeals.

While attempting to board an M-K-T train engine, Mitchell was injured after slipping from its steps. According to Mitchell, ice had formed on the steps and grab-irons of the engine and thus caused him to slip from the train. The jury found that ice was present on the train, but failed to find that M-K-T was negligent under the FELA in maintaining a reasonably safe workplace or in providing reasonably safe equipment. With respect to the claim asserted under the Federal Boiler Inspection Act, the jury also failed to find that the steps and grab-irons were in an improper condition and unsafe to operate.

Prior to the submission of the special issues, Mitchell objected to a portion of the instructions pertaining to the issue of M-K-T's alleged negligence under the FELA. The issue and the contested portion of the instruction read as follows:

SPECIAL ISSUE NO. 4

> Whose negligence, if any, was a cause, in whole or in part, however slight, of the occurrence of January 21, 1984 which has been made the basis of this suit?
>
> * * *
>
> In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant, Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.

Mitchell attacks this instruction for two basic reasons. First, he argues that the instruction violated his federal

substantive rights under the FELA by placing the issue of foreseeability before the jury. Second, Mitchell characterizes the instruction as being an improper comment on the weight of the evidence. On the basis of these two theories, Mitchell claims that the instruction should not have been given and constitutes reversible error in this case.

With regard to the first argument presented by Mitchell, we initially note that federal decisional law determines the extent of substantive rights of parties in a FELA case. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 276 (Tex. 1978). In FELA cases tried in state courts, the state rules of practice and procedure are implemented, but cannot lessen, interfere with, or destroy the substantive rights under the FELA. *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782, 784 (Tex. 1978). Rules relating to the form, necessity, and effect of jury issues and instructions are procedural in nature unless they interfere with the rights or defenses provided by the FELA. *Id.*

Mitchell contends that the instruction at issue interfered with his federal substantive rights by introducing the concept of foreseeability into a FELA action. In a negligence action brought under Texas common law, the concept of foreseeability is an ingredient in determining the scope of duty owed, as well as the proximate cause of the injuries made the basis of the lawsuit. *See Houston Lighting & Power Co. v. Brooks,* 161 Tex. 32, 38, 336 S.W.2d 603, 606-07 (1960). However, the FELA removes foreseeability from the element of causation by imposing liability whenever a negligent act or omission plays any part in causing the injuries of the complainant. *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

It is the position of Mitchell that the jury was improperly instructed to consider foreseeability in determining the causation of his injuries.

The plain language of the instruction, however, fails to support this theory asserted by Mitchell. The instruction does not address M-K-T's ability to reasonably foresee the casual connection between its negligent acts or omissions and Mitchell's injury, but merely focuses on the threshold issue of whether M-K-T knew or should have known of an unsafe condition in its workplace. Moreover, special issue number four incorporates the correct definition of causation under FELA by asking whether the "negligence, if any, was a cause, in whole or in part, however slight, of the occurrence made the basis of this suit." Thus, the jury was not instructed to consider foreseeability in determining the causation of the injuries received by Mitchell.

Although the FELA eliminates the element of foreseeability from the common-law definition of causation, the Act was not intended to transform railroads and other federal employers into absolute insurers. *Wilkerson v. McCarthy,* 336 U.S. 53, 61 (1949). The FELA thus retains the common-law requirement for a negligent act or omission as a prerequisite for liability. Negligence does not attach under the FELA unless the employer knew, or in the exercise of reasonable care should have known, of the risks posed to its employees by conditions in the workplace. *Urie v. Thompson,* 337 U.S. 163, 178 (1949) (employer engages in negligence if he knew or should have known that prevalent standards of conduct were inadequate to protect employees); *Richardson v. Missouri Pac. R.R.,* 677 F.2d 663, 665 (8th Cir. 1982); *Nivens*

v. St. Louis S. W. Ry., 425 F.2d 114, 118 (5th Cir.), *cert. denied*, 400 U.S. 879 (1970); *Miller v. Cincinnati, N.O. & Tx. Pac. Ry.*, 317 F.2d 693, 695 (6th Cir. 1963); *Kaminski v. Chicago River & Ind. R. Co.*, 200 F.2d 1, 4 (7th Cir. 1952). Because the instruction correctly reflected the parameters of liability under the FELA, the instruction at issue did not violate Mitchell's federal substantive rights by predicating a finding of negligence on whether M-K-T knew or should have known of an unsafe condition.

Despite this fact, Mitchell argues that foreseeability is a relevant consideration under the FELA only in establishing the scope of duty owed by the employer. Because the existence of a legal duty is generally a question of law for the court, Mitchell concludes that the instruction on foreseeability, as it related to determining the scope of duty owed, was improper. *See Atchison, T. & S.F. Ry. v. Standard*, 696 S.W.2d 476, 479 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). Nevertheless, the issue of whether the employer knew or reasonably should have known of the risks posed by its workplace is a question of fact for the jury to decide in FELA cases. *Urie*, 337 U.S. at 178; *Almendarez v. Atchison, T. & S.F. Ry.*, 426 F.2d 1095, 1099 (5th Cir. 1970); *see Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658, 660 (6th Cir. 1972) (railroad entitled to jury instruction on whether the railroad had actual or constructive knowledge of defect in premises); *see also Denniston v. Burlington N., Inc.*, 726 F.2d 391, 393-94 (8th Cir. 1984) (not plain error for court to instruct jury that railroad was not negligent absent proof that it knew or should have known of dangerous condition).

Mitchell finally attacks the instruction as being an improper comment on the weight of the evidence. To support this theory, Mitchell cites a litany of cases in which jury instructions amounted to reversible error due to their superfluous or gratuitous nature. *First Int'l Bank v. Roper Corp.*, 686 S.W.2d 602, 604 (Tex. 1985); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984); *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984). However, we do not consider the instruction at issue to be the type of surplusage that was disapproved in *Acord* and its progeny. *See St. Louis S.W. Ry. v. Marks*, 749 S.W.2d 911, 914-15 (Tex. App.—Texarkana 1988, writ denied). The instruction presented a correct statement of FELA law and was necessary for the jury to determine whether M-K-T had breached its duty owed to Mitchell. Given the nature of the instruction and the evidence presented at trial, the trial court did not abuse its discretion in submitting an explanatory instruction that enabled the jury to properly render a verdict. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974); Tex. R. Civ. P. 277.

Accordingly, the judgment of the court of appeals is affirmed.

EUGENE A. COOK
Justice

C. J. Phillips dissents (opinion to follow). Dissent by Justice Ray joined by Justices Mauzy and Doggett.

OPINION DELIVERED: July 5, 1989.

DISSENTING OPINION

I respectfully dissent. The challenged instruction improperly placed foreseeability before the jury. This caused a greater burden to be placed on Mitchell than is allowed under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986). In a Texas common-law negligence case, a charge to a jury could involve the concept of foreseeability in two places, because in Texas, foreseeability is an element of both proximate cause and duty. *Houston Lighting & Power Co. v. Brooks,* 161 Tex. 32, 336 S.W. 2d 603, 606-07 (1960); *Atchinson, T. & S.F. Ry. v. Standard,* 696 S.W.2d 476 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). Fela cases are like common-law negligence cases in that foreseeability plays a part in duty. However, the determination of the scope of duty is a question of law, which is for the court. And, in FELA cases, the jury is not allowed to consider foreseeability in proximate cause. Thus, whether the instruction in question pertained to proximate cause or duty, it improperly allowed the jury to consider foreseeability.

The court states that the instruction "merely focuses on the threshold issue of whatever the M-K-T knew or should have known of an unsafe condition in its workplace." The natural effect of this instruction is to require the jury to consider foreseeability in its inquiry about what the defendant should have known. Although the court states that the issue does not address the M-K-T's ability to reasonably foresee a casual connection, it "appears perilously close to, if not identical with, the foreseeability component of probable cause, which is, essentially, nothing less than the ability to reasonably anticipate consequences." 743 S.W.2d at 668 (Levy, J., dissenting).

A jury should not be instructed on foreseeability as a component of proximate cause in an FELA case. This is because under the FELA a plaintiff need not prove traditional common-law proximate cause, which is the combination of cause-in-fact and foreseeability. In an FELA case, a plaintiff is only required to prove that the railroad's negligence caused, in whole or in part, however slight, the injury or death for which damages are sought. 45 U.S.C. §§ 51-60 (1986); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). Thus, common-law proximate cause plays no part in determining liability in an FELA case and requiring proof of it is reversible error. *Page v. St. Louis S.W. Ry Co.*, 312 F.2d 84 (5th Cir. 1963); *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782 (Tex. 1978).

Also, the instruction at issue would not be proper with respect to the question of duty. Although the United States Supreme Court has eliminated foreseeability relating to causation in FELA cases, the Eastland Court of Appeals in *Standard* noted that foreseeability still plays a part in determining duty. The court of appeals went on to say that "the question of whether a defendant owes a plaintiff a legal duty is a question of law for the court." 696 S.W. 2d at 479.; *see also City of Austin v. Schmedes,* 270 S.W. 2d 442, 446-47 (Tex. Civ. App.—Austin 1954), *aff'd in part, rev'd in part on other grounds,* 154 Tex. 416, 279 S.W.2d 326 (1955). The *Standard* court of appeals concluded: "[A]n instruction to the jury on foreseeability, as it relates to a determination of the scope of duty owed, would be improper." *Standard,* 696 S.W.2d at 479.

The court does not find that the issue in question improperly placed foreseeability before the jury as it relates

to duty. The court states that the FELA retains the common-law requirements for a negligent act and that the issue of whether the defendant knew or reasonably should have known of the risk is a question of fact for the jury. What the court mistakenly infers is that the FELA also retains the same scope and magnitude of the common-law requirements. The FELA imposes a much higher duty on railroads than did the common law. This court allows the jury to denigrate that duty by characterizing the railroad's knowledge of the risk as a question of fact for the jury. In several United States Supreme Court cases, decided more recently than those cited by this court, the broad, remedial nature of the FELA duty is made clear. Although under the common law, knowledge of an unsafe condition may be a requisite for liability, the United States Supreme Court has indicated that actual or even constructive knowledge does not have to play a part in FELA law. In *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1 (1963), the defendant railroad company owned two sets of tracks that were adjacent to a set of tracks owned by another railroad company. An employee of the defendant railroad was injured as a result of the failure of a car door to open on a train operated by the other railroad company on its own tracks. Notwithstanding the defendant's lack of knowledge of this dangerous condition, the Court upheld the railroad's liability based on its nondelegable duty to its employees to provide a safe place to work. The *Shenker* case demonstrates the extremely high duty that FELA imposes upon railroads. That is, a railroad can be liable even when the dangerous condition is not on its own property. In *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, (1956), the Supreme Court commented on the disparity between the duty the FELA creates and the common-law duty:

> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

Id. at 507-08 (Footnotes omitted). Congress intended the FELA to be a broad, remedial statute, and courts have adopted a standard of liberal construction to facilitate Congress' objectives. In *Sinkler v. Missouri Pac. Railroad,* 356 U.S. 326 (1958) (decided a few months after *Rogers* and relying upon *Rogers* for authority) the Court said:

> [I]n interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law . . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety.

Sinkler, 356 U.S. at 329. The degree to which the FELA duty extends is demonstrated in *Gallick v. Baltimore & Ohio Railroad,* 372 U.S. 108 (1963). In *Gallick,* a railroad employee was bitten by an insect while working near a pool of water. The bite led to an infection and the employee eventually lost both of his legs. The Court found

that the railroad was liable, relying upon the high standard pronounced in *Rogers*: "whether there was evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm." *Gallick*, 372 U.S. at 116 (emphasis in the original). This decision, finding an employer negligent in maintaining a stagnant pool, strongly indicates the drastic duty mandated under FELA law.

Recently, a federal court of appeals commented on the broad remedial nature of FELA duty. *Ackley v. Chicago and North Western Transportation Co.*, 820 F.2d 263 (8th Cir. 1987). *Ackley* noted several duties the FELA, including the duty to provide a reasonably safe place to work and the duty to warn employees of unsafe working conditions. *See Bailey v. Central V.R.R.*, 319 U.S. 350 (1943); *Terminal R.R. Ass'n v. Howell*, 165 F.2d 135 (8th Cir. 1948). "In addition to these duties, which are well beyond those imposed under the common law of master and servant, the FELA also eliminates or places conditions on common law defenses available to an employer." *Ackley*, 820 F.2d at 266 n.5.

In *Ackley*, an instruction to the jury stated: "the [railroad] has a right to assume that its employees will exercise reasonable care for their own safety and that they will not disobey safety rules and practices." *Ackley*, 820 F.2d at 266. The court said the charge appeared innocuous on its face, but found prejudicial error nonetheless.

> [T]he FELA provides that the employer's duties are nondelegable and become more imperative as the risk to the employee increases. This continuous duty to

> provide a reasonably safe place to work, while measured by foreseeability standards, is broader under the statute than a general duty of due care.

Ackley, 820 F.2d at 267. The court of appeals, relying on *Rogers* and the Supreme Court decisions which followed it, concluded that what the railroad is entitled to assume about its employee's behavior bears directly on the question of its own duties. "If the Railroad may assume than an employee will not act negligently, then the scope of foreseeability charged to the Railroad is significantly diminished." *Ackley,* 820 F.2d at 268.

Ackley demonstrates the concern which the federal courts have with any instruction which lessens the high duty that FELA imposes on railroads. It is clear from *Rogers* and the subsequent Supreme Court rulings that the FELA is considered to be more than a mere negligence statute. It is a broad and far-reaching law, imposing extraordinary safety obligations upon railroads. It is not absolute liability but the degree of fault necessary to hold the employer liable is certainly much less than what has traditionally been required in the case of common-law negligence.

In sum, not only is less evidence of fault needed to find a railroad liable under the FELA, but also less fault itself is necessary to constitute negligence. If the jury must first find that a railroad "knew or should have known" of unsafe conditions before it can find the railroad negligent, then the scope of foreseeability charged to the railroad is significantly diminished. If the scope of foreseeability is diminished, then the duty itself is diminished. A jury cannot diminish a duty any more than it can dictate what the duty is in the first place.

One of the cases cited by the court in support of the instruction is *Baynum v. Chesapeake & Ohio Railway*, 456 F.2d 658 (6th Cir. 1972). The *Baynum* case did not actually have a similar instruction placed before its jury. The railroad proffered an instruction that read, in pertinent part, that "the defendant cannot be deemed guilty of negligence for a defect in its premises unless it had actual or constructive knowledge of that defect." *Baynum*, 456 F.2d at 659-60. This instruction was refused. The court of appeals commented that it was a proper statement of the law, but that failure to give it was harmless error. The instruction which was accepted stated:

> [I]f you find in the exercise of its duty to exercise ordinary care to provide a safe place to work the railroad had a duty to inspect its ties and walkways where car inspectors and others alighted to make sure they were safe, you may find such duty violated, regardless of whether or not the railroad knew or should have known of the defective condition.

Baynum, 456 F.2d at 660 n.1. The trial court judge thought the instruction was not clear, so he further clarified:

> I left it up to the jury to determine as a matter of fact whether the railroad in the exercise of its duty to provide a safe place to work had a duty to inspect.
>
> I should not have done that because, as a matter of law, the railroad has a duty to inspect in the exercise of its continuing nondelegable duty to provide a safe place to work. In determining whether or not that there was a failure to perform that duty to inspect, it is not pertinent, and therefore not necessary, for the jury to consider whether the railroad knew or should have known about the existence of the defective condition about which you have heard testimony.

Id. The trial judge in *Baynum* was aware of the high standard of care imposed on railroads in FELA cases and was wary of an instruction which allowed the jury to lower it.

The instruction in question lowered the railroad's duty in another manner. It directed the jury's attention to a condition which "must be shown" in order for negligence to be established. It is important to remember that the "unsafe condition" that the trial court referred to in the instruction was the combination of ice on the engine, boarding a moving engine, and inadequate lighting. Although the ice on the steps, platform, and grab irons may be a transitory condition that the M-K-T did not directly cause, the boarding of a moving engine and the inadequate lighting were not transitory conditions. In general, when the transitory condition is one that is created by, or is under the authority of, the defendant, he is deemed to have actual notice of the condition, and therefore, no proof is necessary. *See* Annotation, *Store or Business Premises Slip-and-Fall*, 85 A.L.R.3d 1000, 1003 (1978); *see also Corbin v. Safeway Stores Inc.*, 648 S.W.2d 292, 295 (Tex. 1983). The manner in which Mitchell boarded the moving engine was a customary manner of boarding and was encouraged by the M-K-T. The M-K-T should have been deemed to have had actual notice that Mitchell boarded the engine while it was moving. Further, since a railroad must inspect its workplace to discover dangers and must use reasonable care to remedy them, the M-K-T should also have been charged with actual or constructive knowledge of the inadequate lighting. Even the icy steps could have been an unsafe condition that the court could find foreseeable as a matter of law. *See Kimbler v. Pittsburgh & L.E. R.R.*, 331 F.2d 383 (3d Cir. 1964). Thus,

the charge was improper because it contained unnecessary jury instructions. We also note that, while there are no Texas Pattern Jury Charges for FELA cases, there are federal sources. No "knowledge or notice" instruction is included in the exhaustive FELA instructions found in 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* §§ 94.01-29 (4th ed. 1987 & Supp. 1988). In addition, no "knowledge or notice" instructions can be found in the older instructions compiled by Judge Mathes in *Jury Instructions and Forms for Federal Civil Cases* § 13, 28 F.R.D. 401, 493-501 (1961).

In recent cases, this court has established that unnecessary jury instructions that influence the jury in favor of one of the parties will be reversible error in a closely contested case. *E.g., Acord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984). *Acord* holds that the jury should not be burdened with unnecessary or surplus instructions that are not required for the resolution of the case. Obviously, unnecessary instructions are particularly pernicious if they favor one party over the other. In *Acord*, a products liability case involving a brake defect on a truck, a verdict for defendant was reversed because of the trial court's instruction that a manufacturer is not an insurer of the product he designs, is not required to design perfect or accident proof product, and is not required to incorporate ultimate safety features in its product. This court observed that this instruction was a correct statement of the law. *Acord*, 669 S.W.2d at 114. However, the court held that the jury should not be instructed with these kinds of "balancing factors" and concluded that the instruction was unnecessary. Because the instruction was unnecessary and singled out an extraneous factor for the jury's consideration, the court held that it

was a comment on the weight of the evidence. *Id.* at 116. The instruction in question is also unnecessary. Even if it is a correct, abstract statement of the law, it is unnecessary for the jury's consideration in resolving the case.

The standard for harm from unnecessary instructions is simple: If the case is closely contested, such an instruction may comment on the case as a whole, and so constitute harmful error. *Acord*, 669 S.W.2d at 116. This doctrine is not restricted to products liability cases. In *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), a personal injury auto collision case, the jury was instructed that the "mere happening of a collision of motor vehicles is not evidence of negligence." *Lemos*, 680 S.W.2d at 799 (Tex. 1984). Although the court held that this was an incorrect statement of the law, it also discussed a similar instruction which was a correct statement and concluded: "The jury does not need either instruction. This court has treated addenda to the charge as impermissible comments that tilt or nudge the jury one way or the other." *Lemos*, 680 S.W.2d at 801.

In the case at hand, Judge Levy concluded his dissenting opinion in the court of appeals by stating:

> This instruction was an indirect but powerful comment on the evidence, and even indirectly on the case as a whole—which the record reveals was vehemently contested. As such, it tended to tilt or nudge the jury away from finding the M-K-T negligent, and thereby constituted harmful error.

743 S.W.2d at 668. I agree with Judge Levy's assessment of this problem. Even if the instruction in question was arguably permissible under the FELA, it was unnecessary

for the jury's resolution of the issues and improperly focused the jury's attention on thinking that Mitchell had to prove that the M-K-T "should have known" of the unsafe condition.

For the foregoing reasons, I would reverse the judgment of the court of appeals and would remand this cause for a new trial.

C. L. RAY
Justice

Justices Mauzy and Doggett join in this dissent.

OPINION DELIVERED: July 5, 1980.

IN THE SUPREME COURT OF TEXAS

NO. C-7286

H.W. MITCHELL,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Respondent.

FROM FORT BEND COUNTY

FIRST DISTRICT

DISSENTING OPINION

Because I believe that the instruction as to foreseeability was improperly submitted in connection with the negligence issue, I respectfully dissent.

It is settled that negligence is established under the Federal Employers Liability Act, 45 U.S.C.A. §§ 51-60 (West 1986), when the negligence of the employer played any part, however small, in the injury which is the subject of the suit. *Rogers v. Missouri Pac. R.R.*, 352 U.S. 521 (1957). Foreseeability is thus not a part of the causation standard as to negligence in FELA cases. It is less clear, however, whether foreseeability remains an element of the employer's duty of care. Petitioner cites authorities which appear to impose an absolute duty to provide a safe place to work, regardless of whether the railroad knew or should have known of the dangerous condition. *See, e.g., Shenker v. Baltimore & O.R.R. Co.*, 374 U.S. 1, 10 (1963); *Duncan v. St. Louis-San Francisco Ry. Co*, 480 F.2d 79, 83 (8th Cir. 1973). On the other hand, a num-

ber of authorities indicate that reasonable foreseeability of harm is an element in determining the employer's duty to provide a safe place to work. *See, e.g., Gallick v. Baltimore & O.R.R. Co.*, 372 U.S. 108, 117 (1963); *Urie v. Thompson*, 337 U.S. 163, 178 (1949); *Richardson v. Missouri Pac. Ry. Co.*, 677 F.2d 663, 665 (8th Cir. 1982); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1099 (5th Cir. 1970); *Miller v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 317 F.2d 693, 699 (6th Cir. 1963); *Kaminski v. Chicago River & Indiana Ry. Co.*, 200 F.2d 1, 4 (7th Cir. 1952). While time has vindicated Justice Frankfurter's pessimistic observation that "so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about 'fault' and 'proximate cause,' " *Wilkerson v. McCarthy*, 336 U.S. 53, 66 (1949) (Frankfurter, J., concurring), I believe that under the weight of authority foreseeability remains an element of duty.

The questions for our determination are thus as follows: 1) whether, under the facts of this case, the court or the finder of fact should decide whether the risk was sufficiently foreseeable to impose a duty on the defendant; 2) if the finder of fact is to make this determination, whether the submission of foreseeability as made to the jury was proper; 3) if the submission was improper, was such error harmful and therefore reversible. I will consider each question in turn.

I.

The court holds that the finder of fact should determine foreseeability, relying on several federal decisions which

suggest or imply that "the issue of whether the employer knew or reasonably should have known of the risks posed by its workplace is a question of fact for the jury to decide in FELA cases." ____ S.W.2d at ____. On the basis of this federal authority, the court finds the instruction to be both "correct" and "necessary."

Justice Ray, in dissent, argues that Texas law governs this question. Since the existence of a legal duty is a question of law in Texas, he concludes that the submission of an instruction to the jury on foreseeability in an FELA case is improper, *citing Atchison, T. & S.F. Ry. v. Standard,* 696 S.W.2d 476 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). He would hold that the defendant's duty was established as a matter of law under the facts of this case, making the submission of an instruction to the jury on foreseeability an unnecessary and impermissible "nudge" which, on the record as a whole, constituted harmful error.

While the matter is not free from doubt, I agree with Justice Ray that state law dictates whether the court or finder of fact should determine duty and its factual elements. While federal law governs the substantive rights of the parties in FELA cases, procedural matters are governed by applicable state rules when tried in state court. *St. Louis Sw. Ry. Co. v. Dickerson,* 470 U.S. 409, 411 (1985); *Scott v Atchison, T. & S.F. Ry. Co.,* 572 S.W.2d 273, 276 (1978). This court has recognized that "rules relating to the form, *necessity,* and effect of jury issues are procedural rather than substantive if they do not interfere with a right or defense provided by the F.E.L.A." *Dutton v. Southern Pac. Transp.,* 576 S.W.2d 782, 784 (Tex. 1978) (emphasis added). As no substantive right or defense of the statute is affected by this

determination, I look to the law of this state to resolve this issue.

In Texas, as Justice Ray notes, the existence of a duty is a question of law. *See, e.g., Oldaker v. Lock Constr. Co.*, 528 S.W.2d 71, 77 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Rodriguez v. Carson*, 519 S.W.2d 214, 216 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Webb v. City of Lubbock*, 380 S.W.2d 135, 136 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.); *City of Bryan v. Jenkins*, 247 S.W.2d 925, 928 (Tex. Civ. App. —Waco 1952, writ ref'd n.r.e.); *see also* 1 *Texas Torts and Remedies* § 1.03[2] at 1-22 (J. Edgar & J. Sales eds. 1989); Kilgarlin & Sterba-Boatwright, *The Recent Evolution of Duty in Texas*, 28 So. Tex. L. Rev. 241, 245 (1986). The imposition of a legal duty "depends on such factors as contemporary attitudes on social, economic, and political questions," and their application to the paritcular facts at hand. 1 *Texas Torts and Remedies* § 1.03 [2] at 1-22. In one recent case, for example, this court noted that "factors which should be considered in determining whether the law should impose a duty are the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the [actor]." *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). Among these factors, foreseeability has traditionally been considered the most significant. *See Genell, Inc. v. Flynn*, 163 Tex. 632, 637, 358 S.W.2d 543, 546-47 (1962).

While foreseeability as an element of duty may frequently be determined as a matter of law, in some instances it involves the resolution of disputed facts or inferences which are inappropriate for legal resolution.

See 1 *Texas Torts and Remedies* § 1.03[2]. As the court explained in *Bennett v. Span Industries, Inc.*, 628 S.W.2d 470, 474 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.):

> The existence of duty is a question of law when all of the essential facts are undisputed, but when the evidence does not conclusively establish the pertinent facts or the reasonable inferences to be drawn therefrom, the question becomes one of fact for the jury. A particularly appropriate case for such a rule is one as here, where the risk reasonably to be perceived defines the duty to be obeyed; i.e., where knowledge and foreseeability are important elements of duty.

To me, this is clearly a case where the existence of a duty depends upon "the factual setting and the interplay of factual and legal questions." Kilgarlin & Sterba-Boatwright, *supra,* 28 S. Tex. L. Rev. at 245 (1986). Whether or not the railroad knew or should have known that ice had formed on the steps and grab-irons of the engine is, when the evidence is in conflict, the type of issue which is properly and best resolved by the finder of fact. I disagree with Justice Ray, therefore, that the trial court erred because it "improperly allowed the jury to consider foreseeability."

II.

Although the issue of foreseeability was properly for the jury in this case, I believe that the trial court erred in submitting this question as an instruction to the negligence issue. Since the question was not submitted separately, it is impossible for the trial court or a reviewing court to ascertain whether the jury based its answer on the negligence question or the foreseeability instruction.

By this submission, the trial judge abdicated his responsibility to determine duty. Moreover, the instruction effectively forced the plaintiff to prove foreseeability in order to establish causation, in clear violation of the substantive requirements of the FELA. While I am in favor of broad jury submissions whenever possible, this particular combination of a factual component of a legal question with the ultimate question of fact was plainly error.[1]

III.

Finally, I agree with Justice Ray's conclusion that the submission of this instruction was harmful error. This was not merely the submission of an unnecessary instruction, as in *Accord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984). Rather, it was the submission of an erroneous instruction that materially and improperly increased the plaintiff's burden of proof, and probably amounted to such a denial of the plaintiff's rights as to cause the rendition of an improper judgment in this case.

I would therefore reverse the judgment of the court of appeals and remand this cause to the district court for new trial.

/s/ THOMAS R. PHILLIPS
Thomas R. Phillips
Chief Justice

OPINION DELIVERED: December 20, 1989

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1. In most types of cases, of course, the test of foreseeability is identical under both duty and causation. When the finder of fact resolves a factual dispute as to foreseeability in its answer to a causation issue, that resolution also serves to resolve any factual dispute as to duty. Only in cases where the standard is different, as under the FELA, would a separate submission as to foreseeability be necessary or desirable.

APPENDIX C

Haskell W. MITCHELL, Appellant,

v.

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY,
Appellee.

No. 01-86-00564-CV.

Court of Appeals of Texas,
Houston (1st Dist.)

Sept. 10, 1987.

Rehearing Denied Jan. 28, 1988.

Railroad worker appealed from judgment of the 268th District Court, Fort Bend County, Reagan A. Clark, J., entered in favor of railroad and FELA case. The Court of Appeals, Warren, J., held that instruction that worker was required to show that railroad knew or should have known of any unsafe condition did not require worker to prove foreseeability and was not a comment on the weight of the evidence.

Affirmed.

Levy, J., filed a dissenting opinion.

W. Douglas Matthews, Schmidt & Matthews, Houston, for appellant.

Gay C. Brinson, Jr., Brock C. Akers, Vinson & Elkins, Houston, for appellee.

Before WARREN, DUGGAN and LEVY, J.J.

OPINION

WARREN, Justice.

This is an appeal from a take-nothing judgment in an F.E.L.A. case.

In two points of error, appellant claims that the trial court erred in submitting, over his objection, the following instruction to Special Issue No. 3:

> In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant, [sic] Railroad, it must be shown that the Defendant Railroad, through its officers, agents, and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.

Appellant claims that the instruction was error because it:

> (1) improperly instructed the jury that the plaintiff must prove foreseeability in an F.E.L.A. case; and (2) the instruction amounted to a comment on the weight of the evidence, because it instructed the jury that the plaintiff must prove foreseeability.

Appellant was injured when he allegedly slipped while boarding a moving engine in the dark. He claimed that the steps, platform, and grab iron were coated with ice, which caused him to slip and fall while attempting to board the engine.

Plaintiff's formal pleadings, among other things, alleged that that ice-coated engine constituted a violation of the Boiler Inspection Act, and constituted a violation of ap-

pellee's duty to furnish appellant with a safe place to work.

The jury found that there was ice on the engine, but failed to find that the steps, platform, or grab iron on the engine were in an unsafe condition.

[1] Appellant's initial contention is based on the premise that the instruction of which he complains requires the plaintiff to prove foreseeability. We construe the instruction as one pertaining to knowledge or notice of a defective or dangerous condition, rather than foreseeability.

The instruction given by the court in our case is quite similar to the one refused by the trial court, but approved by the Sixth Circuit Court of Appeals in *Baynum v. Chesapeake and Ohio Railway,* 456 F.2d 658 (6th Cir. 1972).

In *Miller v. Cincinnati, New Orleans and Texas Pacific Railway,* 317 F.2d 693, 695 (6th Cir. 1963), the court restated the rule that in F.E.L.A. actions, where negligence is essential to recovery, a defendant could not be convicted of negligence for a defective condition, absent proof that such defect was known, or should have been known, by the defendant with an opportunity to correct it. In *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed.2d 493 (1957), and *Wilkerson v. McCarthy,* 336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497 (1949), the Supreme Court of the United States affirmed the proposition that actual or constructive notice of a defect by the defendant must be proved before recovery can be had on negligence arising out of the defect.

Appellant's first point of error is overruled.

[2] Appellant's second point of error, urging that the foreseeability charge amounted to a comment on the weight of the evidence must also be overruled because we have held that the instruction pertained to notice rather than to foreseeability.

[3] Appellant makes the logical argument that if he was required to prove notice of the defect as a prerequisite to a recovery on his negligence issue, then appellee likewise should be required to prove that appellant had notice of the defect before he could be adjudged contributorily negligent. We agree with this reasoning, but note that appellant requested no instruction regarding his knowledge of the defects. Any such complaint is waived. Tex. R. Civ. P. 273.

Appellant's second point of error is overruled.

The judgment is affirmed.

LEVY, J., dissents.

LEVY, Justice, dissenting.

Whether the court's instruction given in this Federal Employers' Liability Act case includes, or is equivalent to, the challenged "foreseeability" component of causation, thereby imposing a greater burden on the appellant than F.E.L.A. allows, is the vexatious question before us. Appellant admits in his brief that the jury charge is otherwise correct, and appellee contends that the instruction in question is a necessary and proper element of the court's charge.

The Texas Supreme Court firmly and clearly provided guidelines for Texas trial courts in F.E.L.A. cases when it declared in *Dutton v. Southern Pacific Transportation,*

576 S.W.2d 782, 784 (Tex. 1978), that railroad workers have a right to "have causation of their injuries determined by the simple test of whether they resulted 'in whole or in part' from the railroad's negligence."

This test, which is provided by the federal act itself, 46 U.S.C. §§ 51-60 (1982), is obviously much less burdensome than the common law requirements of "proximate cause," which traditionally have demanded more proof of causation from the plaintiff than federal law permits. Congress has imposed extraordinary burdens on the railroads, the United States Supreme Court has observed, principally to maintain a safe workplace for their employees. *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524, 69 S. Ct. 275, 277, 93 L.Ed. 208 (1949). Accordingly, it is undisputed that M-K-T had a non-delegable duty to provide its workers with a safe place to work. Whether that duty pivots upon knowledge of an unsafe condition, and whether such knowledge is an essential component of F.E.L.A.-defined "negligence," are the basic issues of this litigation.

In this case, the trial court instructed the jury that before it could determine negligence on the defendant's part, the plaintiff had to show that M-K-T "knew, or, in the exercise of ordinary care, '*should have known*' of the unsafe condition." (Emphasis supplied.) To me, this appears perilously close to, if not identical with, the foreseeability component of probable cause, which is, essentially, nothing less than the ability to reasonably anticipate consequences. It thus seems inconsistent with the Congressional purpose in altering "proximate cause" to "F.E.L.A. cause" so as to establish liability merely when a defendant's negligence played any part, *even the slight-*

est, in producing an injury. See *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506-07, 77 S. Ct. 443, 448-49, 1 L.Ed.2d 493 (1957). It is relevant, although perhaps trite, to observe that this case involves appellant's substantive *federal* rights, inasmuch as it arises under the F.E.L.A., and federal law is controlling, excepting only procedural questions. These questions, however, may not compromise appellant's rights under the F.E.L.A. *See generally Scott v. Atchison, T & S.F. Ry.*, 572 S.W.2d 273, 276, 281-82 (Tex. 1978) (op. on reh'g).

Foreseeability of harm in an F.E.L.A. case is an ingredient only in establishing the scope of legal duty owed by the railroad, but that is a question of law for the court, not a question of fact for the jury. *See Atchison, T. & S.F. Ry. v. Standard,* 696 S.W.2d 476 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). The court may, however, instruct the jury on the *nature* of the duty owed, as appellee contends, so that the jury would be able to determine whether negligence has been proved by applying that legal duty to the facts of the case.

Further, I agree with the appellant's argument in his second point of error, that jury instructions that are unnecessary and that influence the jury, *even if quite subtly,* in favor of one of the parties—no matter if the instructions are correct statements of the law—are reversible error in a closely contested case, as this case obviously was. *See Acord v. General Motors Corp.*, 669 S.W.2d 111 (Tex. 1984). Because the instruction was unnecessary and singled out a special, if not superfluous, factor for the jury's consideration, the Texas Supreme Court held in *Acord* that, functionally, it was a comment on the

weight of the evidence, and tended by its emphasis to incline the jury towards the defendant.

Even if the instruction in question was theoretically correct in its statement of F.E.L.A. law, it was arguably unnecessary for the jury's resolution of the issues, and focused the jury's attention on the necessity for the appellant to prove that the M-K-T "should have known" of the unsafe condition. I do not agree with appellee's argument that this principle is inherently applicable only to products liability or design defect cases. This instruction was an indirect but powerful comment on the evidence, and even indirectly on the case as a whole—which the record reveals was vehemently contested. As such, it tended to tilt or nudge the jury away from finding the M-K-T negligent and toward finding the appellant negligent, and thereby constituted harmful error. *See Lemos v. Montez,* 680 S.W.2d 798 (Tex. 1984).

For the foregoing reasons, I would sustain both of appellant's points of error, reverse the trial court's judgment, and remand for a new trial.

APPENDIX D

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711

John T. Adams, Clerk

May 2, 1990

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Ms. Catherine Bukowski
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RE: Case No. C-7286

STYLE: H. W. MITCHELL
v. MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

John T. Adams, Clerk

By /s/ BLANCA E. MORIN
Deputy

APPENDIX E

45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

APPENDIX F

No. 49,428

IN THE 268TH JUDICIAL DISTRICT COURT OF FORT BEND COUNTY, TEXAS

H. W. MITCHELL

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

CHARGE OF THE COURT

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not

consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figure and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses,

parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

You are instructed that the term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in evidence in this case. Answer all questions based on a preponderance of the evidence properly before you.

You are instructed that "ordinary care" means that degree of care which would be used by a person or railroad of ordinary prudence under the same or similar circumstances. You are also instructed that "negligence" means failure to use ordinary care, that is to say, failure to do that which a person or railroad of ordinary prudence would have done under the same or similar circumstances or doing that which a person or railroad of ordinary prudence would not have done under the same or similar circumstances.

In determining these questions, you should take into consideration all of the evidence you deem worthy of belief, including the rules, customs and practices of the railroads.

While the custom of other railroads is not controlling and the customary way may or may not involve negligence, such custom may be considered along with other facts and circumstances of the case.

Answer "Yes" or "No" unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No."

SPECIAL ISSUE NO. 1

At the time H. W. Mitchell attempted to board the engine on January 21, 1984, did ice exist on the steps, platform and/or grab irons of Engine No. 217?

Answer "Yes" or "No".

ANSWER: Yes.

SPECIAL ISSUE NO. 2

If you have answered Special Issue No. 1 "Yes", then in that event, answer Special Issue No. 2, otherwise, do not answer Issue No. 2.

Were the steps, platform and/or grab irons of the engine in question in an improper condition and unsafe to operate as a result of the ice thereon, if any you have so found, at the time Plaintiff, H. W. Mitchell, attempted to board said engine on January 21, 1984?

You are instructed that a railroad such as the M-K-T Railroad has an absolute and continuing duty to see that its locomotives and all of their parts and appurtenances are in a proper condition and safe to operate in the service to which the same are put. You are instructed that the terms "an improper condition and unsafe to operate" mean that the steps, platform and/or grab irons are in such a condition that they could not be put into active

service of the railroad without unnecessary peril to life and limb of the railroad's employees.

Answer "Yes" or "No".

ANSWER: No.

If you have answered Question No. 2 "Yes" and only in that event, then answer:

SPECIAL ISSUE NO. 3

Was the fact that the steps, platform and/or grabirons were in an improper condition and unsafe to operate, a cause, in whole or in part, however slight, of the occurrence of January 21, 1984?

Answer "Yes" or "No".

ANSWER: _____

SPECIAL ISSUE NO. 4

Whose negligence, if any, was a cause, in whole or in part, however slight, of the occurrence of January 21, 1984 which has been made the basis of this suit?

In your determination of this issue, you are to consider the following alleged acts or omissions, if any, of the parties and none other:

With respect to the Defendant-Railroad: whether or not the railroad failed to provide H. W. Mitchell with a reasonably safe place in which to work on January 21,

1984 and/or whether or not the railroad failed to provide H. W. Mitchell with reasonably safe equipment with which to work on January 21, 1984.

With respect to the Plaintiff, H. W. Mitchell: whether or not H. W. Mitchell failed to keep a proper lookout for his own safety when boarding the locomotive on the occasion in question.

By the term "proper lookout" is meant that kind and character of lookout that would have been kept by a reasonably prudent railroad brakeman under the same or similar circumstances.

You are instructed that a railroad such as M-K-T Railroad owes a continuing and non-delegable duty to employees such as H. W. Mitchell to provide them with a reasonably safe place in which to work and with reasonably safe equipment with which to work even though the work may have been fleeting or infrequent. You are instructed that the terms "reasonably safe place in which to work" and "reasonably safe equipment with which to work" mean such a place and equipment that from a standpoint of safety to employees would be furnished by an ordinary prudent railroad in the exercise of ordinary care to its employees under the same or similar circumstances.

In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant, Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.

Answer "Yes" or "No" beside the name of each party listed:

M-K-T Railroad: No.

H. W. Mitchell: Yes.

If you have answered "Yes" in both blanks of Question No. 4 and only then, please answer:

SPECIAL ISSUE NO. 5

What percentage of the negligence which caused, in whole or in part, however slight, the occurrence of January 21, 1984 was attributable to each of the parties found by you to have been negligent?

The percentage of negligence attributable to a party is not necessarily measured by the number of acts or omissions you find.

In answering this question, you should consider only the negligence, if any, of the M-K-T Railroad and Haskell Mitchell which you have found to be a cause of the occurrence; therefore, the percentages should add up to 100%.

ANSWER by stating the percentage, if any, opposite each name:

M-K-T Railroad: _____%

Haskell Mitchell: _____%

TOTAL: 100%

SPECIAL ISSUE NO. 6

What sum of money, if any, if now paid in cash, would be compensation for the reasonable expenses, if any, for the necessary medical care which H. W. Mitchell required in the past for treatment of his injuries resulting from the occurrence of January 21, 1984?

> In answering this question, do not reduce the amounts in your answer because of the percentage of negligence, if any, of any party.

ANSWER in dollars and cents, if any.

ANSWER: $14,482.65.

SPECIAL ISSUE NO. 7

What sum of money, if any, if now paid in cash, would be compensation for the reasonable expenses, if any, for necessary medical care which H. W. Mitchell will, in reasonable probability, require in the future for the treatment of his injuries resulting from the occurrence of January 21, 1984?

> In answering this question, do not reduce the amounts of your answers because of the percentage of negligence, if any, of any party.

ANSWER in dollars and cents, if any.

ANSWER: $30,000.00.

SPECIAL ISSUE NO. 8

What sum of money, if any, if now paid in cash, would fairly and reasonably compensate H. W. Mitchell for his injuries, if any, which you find resulted from the occurrence of January 21, 1984?

Consider the following elements of damage, if any, and none other. Answer in dollars and cents, if any:

a.	Physical pain and mental anguish in the past:	$ 40,000.00
b.	Physical pain and mental anguish which, in reasonable probability, H. W. Mitchell will suffer in the future:	$ 51,100.00
c.	Loss of earnings in the past:	$ 69,203.00
d.	Loss of earning capacity which, in reasonable probability, H. W. Mitchell will sustain in the future:	$338,002.50
e.	Physical impairment in the past:	$ 2,569.00
f.	Physical impairment which, in reasonable probability, H. W Mitchell will suffer in the future:	$ 16,403.10

You are instructed that in answering this question, you shall not award any amount for physical impairment which you have included in your award, if any, for lost earnings or earning capacity and vice versa.

In answering this question, do not reduce the amounts in your answer because of the percentage of negligence, if any, of any party.

Do not include any amount for any contention not resulting from the injuries, if any, that resulted from the occurrence in question.

Your award, if any, will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award, if any.

In determining the present value of money, you must take into consideration the rate of interest for which money can be safely and securely invested, and you must determine the present value of any amount you may so allow as damages by discounting the same, or deducting therefrom annually, an amount equal to the rate of interest at which such sum could be safely and securely invested during the period for which you may allow such damages.

An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can reasonably be done.

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror:

1. To preside during your deliberations;

2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. To write out and hand to the baliff any communication concerning the case which you desire to have delivered to the judge;

4. To vote on the issues;

5. To write your answers to the issues in the spaces provided; and,

6. To certify to your verdict in the space provided for the presiding juror's signature.

After you have retired to consider your verdict, no one has any authority to communicate with you except the baliff of this court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact. When you have answered all of the foregoing special issues which you are required to answer under the instructions of the judge, and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror, you will advise the baliff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ A. REAGAN CLARK
Judge Presiding

Filed: March 31, 1986 at 10:48 A.M.

CERTIFICATE

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

To be signed by the presiding juror if unanimous.

_____

Presiding Juror

To be signed by those rendering the verdict if not unanimous.

/s/ Julis Renfrow
/s/ Helen Gallerani
/s/ Daniel R. Robertson
/s/ Charlene Harris
/s/ David Debnekoff
/s/ Kim Koteras
/s/ Manuel D. Garza
/s/ Elroy Newmon
/s/ David Thom
/s/ Artimeace S. Wilson
/s/ Wanda Benge

NO. 90-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

H. W. MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction

On a dark, winter night in 1984, respondent Haskell Mitchell, a brakeman for petitioner, was required to board a moving engine pulling a train through North Texas. Because he could not see the ice covering the engine steps and grab-irons, his feet and hands slipped and he slid to the ground. He clung to the grab-irons so that he would not roll under the engine and was dragged along the ground. He received multiple injuries to his back. After several operations to his back, he has been physically unable to find gainful employment since this incident about six years ago.

At the trial of this case, the trial court gave the jury an instruction concerning "foreseeability" or "knowledge" about the unsafe conditions which confronted Haskell Mitchell. The jury found for the Missouri-Kansas-Texas Railroad Company (M-K-T or petitioner). The Texas Supreme Court ultimately reversed and remanded this case for a second trial because the instruction was improperly worded. Out of this Texas procedural decision, petitioner has applied for a writ of certiorari claiming that the decision of the Texas Supreme Court violated its substantive federal rights under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1986) (FELA).

B. Statement of Facts

On January 21, 1984, the M-K-T train was brought through the Denison Yard in Denison, Texas,[1] a small comunity located near the Texas-Oklahoma border about 60 miles north of Dallas. The train was going from Oklahoma to Dallas.[2] It arrived at the Denison Yard about 5:30 a.m.[3] The winter morning was dark and cold.[4]

The crew was required to board the train as it was moving between 3 and 6 miles per hour.[5] It was dark at the boarding location in the Yard because both an overhead light and a light on the engine were not work-

1. S.F. 194. References to the reporter's transcript of the testimony, referred to as the statement of facts in the Texas practice, will be abbreviated "S.F." followed by a page number.

2. S.F. 194-95.

3. S.F. 197.

4. S.F. 202.

5. S.F. 240-241; 290-91; 309; 424; 538-39.

ing.[6] When respondent tried to board the engine, he could not see the ice on the engine steps and grab-irons. He lost his footing on the steps and his hold on the grab-irons, and then slid down the ice-covered surfaces. Mr. Mitchell hit the ground and was dragged along by the engine for a short distance before he was able to get back up on it.[7] Several hours after respondent's fall, the train stopped briefly at Atkins, Texas. In the light of the morning sun, the crew could see that the engine was covered with ice.[8]

At the time of this incident, respondent was a forty-nine year old brakeman with a wife and two sons. He earned about $33,000 per year. In this incident, five levels of respondent's back were injured and he underwent three surgical fusions. Because of his injuries, he has been in such pain that he cannot sleep through the night and suffers from severe depression.[9] He is totally disabled from railroad work and has not been able to find a non-railroad job he can do since January 21, 1984.

C. Procedural History

After the evidence was presented, the trial court submitted special issues and instructions to the jury.[10] The

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6. S.F. 212-13.

7. S.F. 203-04.

8. S.F. 209.

9. S.F. 187; 220; 222; 226; 230.

10. The jury instructions, as is the normal Texas practice, were contained in part in the special issues or special verdict forms submitted to the jury. The FELA negligence question, which included the instruction at issue in this case, was submitted as Special Issue No. 4. Pet. App. at 55a-56a.

negligence and causation questions were submitted in one special issue, as is the Texas practice.[11] As a part of the negligence and causation special issue, the jury was instructed that:

> In answering this issue, you are instructed that, before negligence, if any, can be established against the Defendant Railroad, it must be shown that the Defendant, Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.[12]

Pet. App. at 56a. The specific wording of this instruction was not requested by either party. Instead, the trial court —which had never before tried a FELA case—drafted the instruction on its own after the charge conference. Despite respondent's extensive objections to this instruc-

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11. Tex. R. Civ. P. Ann. r. 277 (Vernon Supp. 1990). ("In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.") The instruction in question was appended to the negligence and causation special issue. Pet. App. at 55a-56a. The Texas Supreme Court held that this instruction "confused the issue of foreseeability relating to duty with the concept of causation." Pet. App. at 8a. There is ample authority that under the FELA the jury should not be instructed on foreseeability with respect to causation. *See, inter alia, Page v. St. Louis Sw. Ry.*, 312 S.W.2d 84, 92 (5th Cir. 1963); *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782, 784-85 (Tex. 1978). The Texas Supreme Court left open the question of whether or not a differently phrased knowledge instruction placed in a different location in the charge would be error.

12. The Texas Supreme Court refers to this instruction as dealing with foreseeability. Petitioner refers to it as dealing with the employer's knowledge. In Texas, "foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent conduct created. *Williams v. Steves Indus.*, 699 S.W.2d 570, 575 (Tex. 1985). An actor's knowledge of the hazard is obviously one of the components of foreseeability.

tion, the trial court gave it to the jury and the jury found for petitioner.

Respondent appealed to the Texas Court of Appeals. Respondent argued that the instruction improperly burdened his rights under the FELA because it had the effect of requiring him to prove foreseeability in order to prove causation. The Court of Appeals, by a two to one decision, rejected respondent's arguments.

Respondent then sought review by the Texas Supreme Court. On rehearing, that court reversed this case and remanded it for a new trial. The Texas Supreme Court held that "the question of the employer's knowledge may be one for the jury; however, in this case, the instruction confused the issue of foreseeability relating to duty with the concept of causation."[13] Pet. App. at 8a. The court also approved the Fifth Circuit Pattern Jury Instructions for use in Texas courts in future FELA cases, observing that: "[u]se of the . . . *Pattern Jury Instructions* will allow the jury to decide disputed facts relating to the employer's knowledge, will allow the court to decide the legal question of duty, and will prevent the jury from regarding a finding of foreseeability as a prerequisite to its answering the causation issue affirmatively." Pet. App. at 9a-10a. The Fifth Circuit Pattern Jury Instructions for FELA cases do not contain a "foreseeability" or "knowledge" instruction.

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13. The primary issue in the courts below was whether this instruction violated *respondent's* rights under the FELA. This issue turned on whether the instruction was, in effect, a foreseeability instruction that the jury applied to the causation issue. While this question is a close one—as indicated by the Texas Supreme Court's five-four split on the issue—it was decided in respondent's favor. The question before this Court is whether the Texas Supreme Court has violated *petitioner's* federal substantive rights.

REASONS FOR DENYING THE WRIT

Petitioner presents one question for this Court's review. That question is whether the FELA requires "that the jury consider whether a defendant had actual or constructive knowledge of a dangerous condition before the defendant can be found negligent?" Petition at I. This question has application only to FELA cases. The issues with which the Texas Supreme Court dealt in this case have little application outside of Texas. The lower court limited its holdings to the facts of this case. Pet. App. at 8a. This Court's policy has been to abstain from taking a case "if the decision did not involve an important question of law, did not create a diversity of decision in the lower courts, or would not seriously affect the administration of the law in other cases." *Bailey v. Central Vt. Ry.*, 319 U.S. 350, 357 (1943) (Roberts, J., dissenting). This case fits none of those criteria.

In presenting this question, petitioner assumes the burden of demonstrating two underlying propositions: (1) that the Texas Supreme Court in fact ruled that the jury should not "consider whether a defendant had actual or constructive knowledge of a dangerous condition" in an FELA lawsuit; and (2) that an FELA defendant is always entitled to an instruction concerning the railroad's knowledge as a matter of federal substantive right under the Act. Petitioner cannot demonstrate either of these propositions.

First. The Texas Supreme Court did not rule that a jury in an FELA case cannot consider whether a defendant had actual or constructive knowledge of a dangerous condition. The court held that the particular instruction in the particular charge given to the jury in

this case was reversible error.[14] Petitioner does not directly challenge this conclusion. The Texas Supreme Court did not preclude the jury from considering whether petitioner had actual or constructive knowledge of the facts that the Denison Yard was poorly lit at the location of the accident, that its crews normally had to board moving trains at that yard, or that the engine from which respondent fell was covered with ice on the morning of the accident.[15] In fact, the lower court held:

> This is clearly a case when the existence of a duty depends upon "the factual setting and the interplay of factual and legal questions." *Whether or not the railroad knew or should have known that ice had formed on the steps and grab-irons of the engine is,* when the evidence is in conflict, *the type of issue which is properly and best resolved by the finder of fact.*
>
> We hold that the question of the employer's knowledge may be one for the jury. . . .

Pet. App. at 8a (emphasis added, citations omitted). There is no conflict between the rule of law described by petitioner and the opinion of the Texas Supreme Court.

Petitioner cites several FELA cases which hold that knowledge or foreseeability of the hazard is required by the Act. The Texas Supreme Court agrees. As the quote

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14. The Texas Supreme Court held that "the question of the employer's knowledge may be one for the jury; however, in this case, the instruction confused the issue of foreseeability relating to duty with the concept of causation." Pet. App. at 8a.

15. While petitioner presents this case as if it only involves weather conditions, the hazard respondent faced was a combination of three factors: (1) boarding a moving engine in the dark; (2) inadequate lighting of the yard and on the engine; and (3) ice covering the engine steps and grab-irons.

from the Texas Supreme Court's opinion above indicates, the Court held that in this case the knowledge question was for the jury. The court observed that "under the weight of the authority foreseeability remains an element of duty." Pet. App. at 5a. The court suggested the Fifth Circuit Pattern Jury Instructions for FELA cases should be used in Texas, in part because those instructions would "allow the jury to decide disputed facts relating to the employer's knowledge. . . ." Pet. App. at 9a. Since the Texas Supreme Court has held that the jury should consider the employer's knowledge in FELA cases, the conflict which petitioner argues justifies this Court's review simply does not exist.

The *Mitchell* opinion leaves unchanged the FELA law concerning knowledge or foreseeability. The Texas Supreme Court has also left open the propriety of knowledge instructions in Texas FELA cases. The court simply held that the particular instruction given by the trial court in this case was erroneous because of the way it was worded. The first proposition which petitioner must demonstrate to this Court—the proposition that the lower court condemned all knowledge instructions in FELA cases—is simply not the case.

Second. Even if the Texas Supreme Court had held that a jury should not be charged on the railroad's knowledge of a dangerous condition in an FELA case, petitioner still must show that an FELA defendant is *always* entitled to a knowledge instruction as a matter of federal substantive right. The Texas Supreme Court did not consider this matter to be substantive. Pet. App. at 6a ("As no substantive right or defense of the statute is affected by this determination, we look to the law of the state to resolve this issue.").

Petitioner simply asserts that its substantive rights were violated, as if this is a self-demonstrating fact, but never explains how its rights have been impaired. In order for a violation of federal substantive rights to be involved, petitioner must show that its right to a knowledge instruction is absolute—that the absence of a knowledge instruction will always be reversible error. In other words, petitioner must show that all FELA dangerous condition cases in which railroad defendants do not receive a knowledge instruction should be reversed.[16]

Petitioner does not cite any authority which holds that a railroad defendant must always receive a knowledge instruction in an FELA case as a matter of federal substantive right. In fact, neither petitioner nor respondent have found a single case which holds that the lack of a knowledge instruction is reversible error. The very opinion which the petitioner urges is in conflict with the *Mitchell* decision, *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), does not hold that a knowledge instruction is a substantive right under the FELA or that its absence is reversible error. In *Baynum*, the plaintiff prevailed against the railroad at trial. 456 F.2d at 659. A knowledge instruction was not given to the jury. 456 F.2d at 659-60. Yet the lack of this in-

16. Petitioner cites numerous cases which hold generally that knowledge of the hazard or foreseeability is an element which a plaintiff must establish to demonstrate liability for negligence under the FELA. However, with the exception of *Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658 (6th Cir. 1972), none of the cases which petitioner cites involve knowledge instructions. The Texas Supreme Court's opinion in this case is consistent with the general principles outlined by the cases petitioner cites. The Texas Supreme Court held that "we believe that under the weight of authority foreseeability remains an element of duty," and "[w]e hold that the question of the employer's knowledge may be one for the jury. . . ." Pet. App. at 5a & 8a.

struction was not held to be reversible error by the Sixth Circuit, and the plaintiff's verdict in *Baynum* was affirmed.[17]

Petitioner attempts to create the impression that a knowledge instruction is routinely given in the ordinary FELA dangerous condition case, and that the Texas Supreme Court is out of step with the majority of the courts. This is not true. Many jurisdictions submit FELA cases to the jury without any specific knowledge instruction. The easiest way to examine the practice of various jurisdictions is to look at their pattern (or standardized) jury instructions. For instance, the Fifth Circuit Pattern Jury Instructions for FELA cases do not include such an instruction. Committee on Pattern Jury Instructions, District Judges Association of the Fifth Circuit, *Pattern Jury Instructions (Civil Cases)* § 6 (West 1983). A knowledge instruction is also not recommended in the Eleventh Circuit FELA Pattern Jury Instructions. Committee on Pattern Jury Instructions, District Judges Association of the Eleventh Circuit, *Pattern Jury Instructions: Civil Cases* § 6.01 (West 1990).[18] Additionally, neither the Illinois

17. "Accordingly, under these circumstances, we determine that [the railroad] *was not prejudiced by the court's refusal to give the proffered instruction or its equivalent that [the railroad] could be held liable only if it had actual or constructive knowledge of the defect.*" *Baynum*, 456 F.2d at 660 (emphasis added).

18. The Ninth Circuit is the only other circuit which has adopted civil pattern jury instructions. While the Ninth Circuit model jury instructions do not include FELA instructions, they do include Jones Act instructions. Committee on Model Jury Instructions, Ninth Circuit, *Manual of Model Jury Instructions* § 14.02A-14.02C (West 1985). The Ninth Circuit model jury instructions do not require the jury be instructed on the issue of the employer's knowledge in Jones Act cases. Since the Jones Act incorporates the liability provisions of the FELA by reference, 46 U.S.C. § 688 (1986), it can be assumed that FELA jury instructions in the Ninth Circuit also do not include a knowledge instruction.

nor the California state pattern jury instructions for FELA cases recommend submitting a knowledge instruction to the jury.[19] Illinois Supreme Court Committee on Jury Instructions. *Illinois Pattern Jury Instructions (Civil)* §§ 160.00-160.24 (2nd ed. West 1971); Committee on Standard Jury Instructions, *Book of Approved Jury Instruction Forms—California Jury Instructions (Civil)* §§ 11.07-11.18 (7th ed. West 1990). The most commonly used non-statutory pattern jury instructions, which contain exhaustive suggested FELA instructions, do not contain a knowledge instruction. 3 E. Devitt & C. Blackmar, *Federal Jury Practice & Instructions* §§ 94.01-94.29 (1977 & Supp. 1990). Additionally, no knowledge instruction is suggested in the non-statutory jury instructions which were used prior to Devitt & Blackmar. *See* Mathes, *Jury Instructions & Forms for Federal Civil Cases* § 13, 28 F.R.D. 401, 493 (1961); Ford, *Forms of Interrogatories,* 38 F.R.D. 199, 282-285 (1965).

A knowledge instruction is not required in many of the jurisdictions where a large number of FELA cases are tried. This is significant in two ways. First, if petitioner's argument were valid, there should be many reported appellate cases squarely holding that a knowledge instruction must be given to the jury in an FELA case. Because of the great number of FELA lawsuits which have been tried and are still being tried without such an instruction, there should be cases which directly hold that the failure to give the instruction is reversible error. Petitioner cites no such cases and respondent has found none.

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19. California and Illinois have historically been the sites of a great deal of FELA litigation, probably because of the concentration of railroad workers and rail transportation in those states.

The large number of FELA cases which are being tried without a knowledge instruction is significant for a second reason. If this Court grants the petition for writ of certiorari in this case, it is inviting a substantial increase in the amount of FELA litigation which will come before it.[20] Clearly, if federal FELA cases in the Fifth, Ninth and Eleventh Circuits and state FELA cases in at least Texas, Illinois and California are routinely tried without knowledge instructions, granting the writ in this case will serve as a clear signal for parties who lose below to file their petitions for writ of certiorari with the Court. The increase in this Court's case load will be certain and substantial.

Finally, petitioner does not show how its substantive FELA rights were violated. The Texas Supreme Court has remanded this case for a new trial. The petitioner will be entitled to all of the rights which it previously had when the case is retried. The Texas Supreme Court has limited neither the evidence which the M-K-T may introduce at the second trial nor has it deprived the railroad of any defense it might have. Petitioner has lost nothing except the jury verdict which the Texas Supreme Court has determined was the result of an erroneous jury instruction. No denial of any federal substantive right has occurred simply because a party must submit to a second trial of a case in which the jury was incorrectly charged.

The FELA has been extensively interpreted by this Court, particularly in a long series of opinions dating

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20. Justice Frankfurter observed that granting certiorari in FELA cases also increases the filings of petitions for writ of certiorari in "other types of cases raising issues that likewise have no business to be brought here." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 518, 544 (1957) (Frankfurter, J., dissenting).

from 1939 until the late 1950's. During these decades, in part because of the lower federal courts' reluctance to implement the humane purposes of the FELA, this Court virtually exercised supervisory jurisdiction over railroad cases. *See Wilkerson v. McCarthy,* 336 U.S. 53, 69-71 (1949) (Douglas, J., concurring). This Court decided a great number of FELA cases in this period in order to firmly reject the "narrow, technical approach of earlier years." *Kelley v. Southern Pac. Co.,* 419 U.S. 318, 334 (1974) (Douglas, J., dissenting). Because of this Court's earlier activism in policing the FELA, the Act is one of the most thoroughly and comprehensively explicated pieces of legislation in existence today.

Given this Court's wide-ranging commentary on the FELA, there can hardly be an argument on which the lower federal and state courts need further guidance from this Court.[21] By the same token, this Court's time is surely more profitably spent analyzing issues which it has not so carefully and exhaustively considered. Chief Justice Taft wrote more than sixty years ago that the Court should grant review only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

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21. The case at bar is not even of wide application in the limited arena of FELA litigation. The opinion in this case does not condemn all knowledge instructions in FELA cases, but rather finds error because of the phrasing of this specific instruction. The result in this case is limited to FELA cases brought in Texas state courts in which an instruction on knowledge is given which forces the plaintiff to prove foreseeability with respect to causation.

CONCLUSION

This case does not present the "special and important reasons" which are required for this Court's grant of plenary review. This is not a case which involves issues of broad application or importance to the public, but rather only involves a limited procedural area—FELA jury instructions—as it is applied in a single state—Texas. This case does not present a conflict between the opinion of the Texas Supreme Court and any decision of a federal court of appeals or of this Court. While the result in this lawsuit is unquestionably important to the litigants themselves, the Texas Supreme Court's decision is limited to the specific facts of this case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September 11, 1990

(3)

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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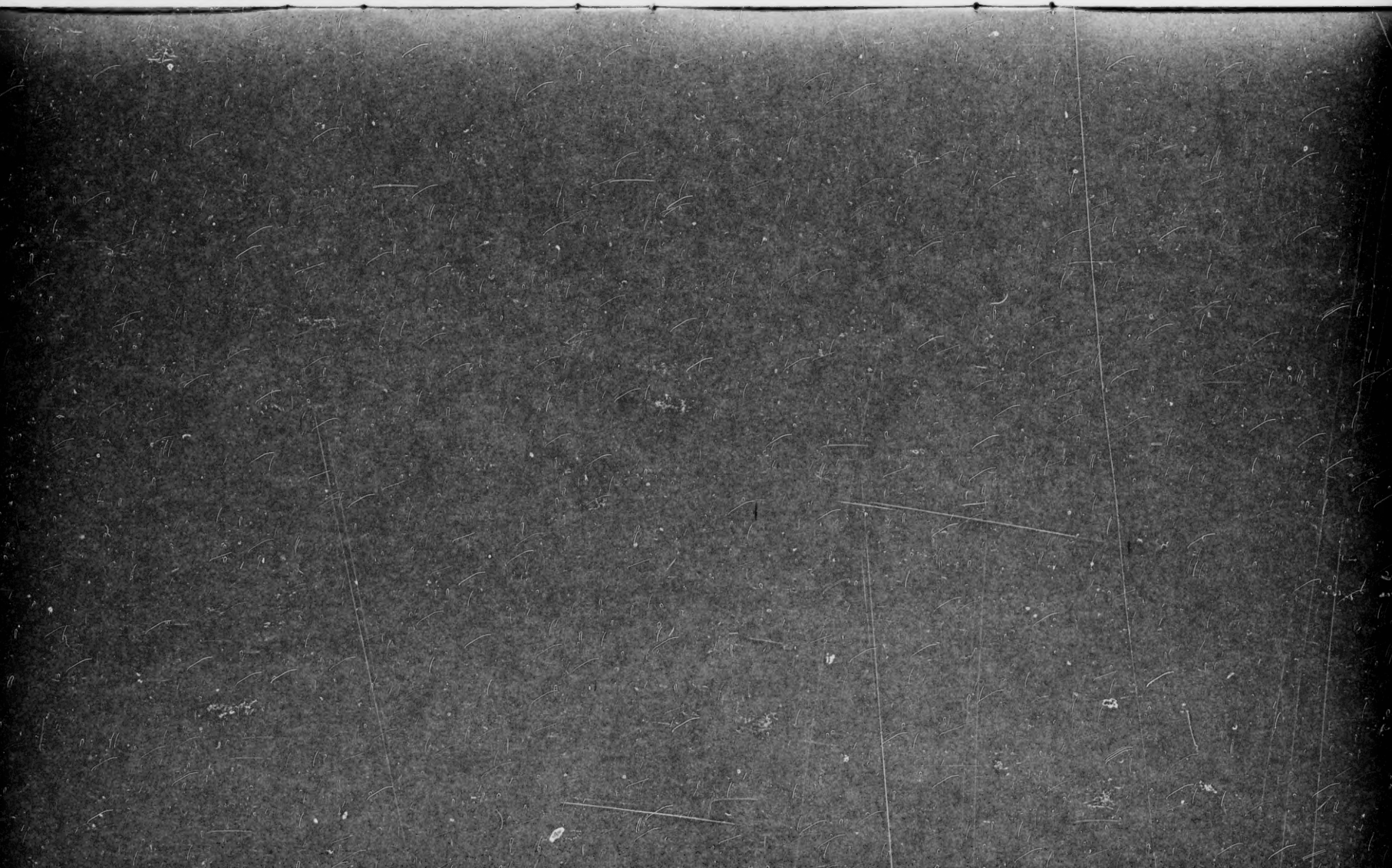

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MISSOURI PACIFIC RAIROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

H. W. MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. THE TRIAL COURT, AND NOT THE PARTIES, GIVES THE CHARGE TO THE JURY IN TEXAS. THE TRIAL JUDGE'S EXPERIENCE WITH FELA CASES IS IRRELEVANT AND OUTSIDE THE RECORD.

On page 4 of the Respondent's Brief in Opposition, the Respondent states that "[t]he specific wording of this instruction was not requested by either party. Instead,

the trial court—which had never before tried a FELA case—drafted the instruction on its own after the charge conference." This statement is outside the record and is patently preposterous. The Respondent erroneously suggests that by assuming responsibility for the charge given to the jury, the trial court acted improperly. In Texas, it is the trial court's duty to prepare and in open court deliver a written charge to the jury. Tex. R. Civ. P. 271; 3 R. McDonald *Texas Civil Practice in District and County Courts* § 12.24 (rev. 1970). After the judge prepares and files the charge, the parties or their attorneys are given an opportunity to present objections and to request additions to it. Tex. R. Civ. P. 272; 3 R. McDonald, *supra,* § 12.25. The trial judge followed proper procedure in this case. Respondent's statement is irrelevant, outside the record, and should be ignored.

II. NEITHER THE RESPONDENT NOR THE SUPREME COURT OF TEXAS GRASPS THE DISTINCTION BETWEEN KNOWLEDGE OF A DANGEROUS CONDITION AS A PREREQUISITE TO A FINDING OF NEGLIGENCE AND FORESEEABILITY OF HARM AS A FACTOR IN CAUSATION.

The Respondent's Brief simply reiterates his befuddlement, as well as that of the Texas Supreme Court, in attempting to explain why, on the one hand, an instruction on the employer's knowledge is proper in a FELA case before that employer can be found negligent, and why, on the other hand, the instruction before this Court "effectively forced the plaintiff to prove foreseeability in order to establish causation, in clear violation of the

substantive requirements of the FELA." (*See* Petition For Writ of Certiorari, p. 5a). The opening words of the jury issue in question demonstrate that foreseeability is not to be considered in determining causation:

"Whose negligence, if any, *was a cause, in whole or in part, however slight,* of the occurrence of January 21, 1984 which has been made the basis of this suit?" (*See* Petition For Writ of Certiorari, p. 55a) (emphasis supplied).

Petitioner requests the Court to address the method by which a FELA case involving a transitory danger is to be submitted to the jury. The "recommended" language of a pattern charge is not equivalent to the language required to fulfill the intent of Congress.

CONCLUSION

For these reasons, and for those set out in the Petition for Writ of Certiorari, the Petitioners request that certiorari be granted, and that the judgment of the Supreme Court of Texas be reversed. The Texas Supreme Court's opinion conflicts with the well settled principles established in decisions of this Court and other courts,

and will cause Texas jury charges under FELA to be inconsistent with those of every other jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gay C. Brinson, Jr., a member of the bar of this Court, certify that on this 1st day of October, 1990, three copies of the Petitioner's Reply to Brief in Opposition were mailed, first class postage prepaid, to the person listed below, and that all parties required to be served have been served.

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